DISPUTE RESOLUTION:

A DIRECTORY OF METHODS,

PROJECTS AND RESOURCES

Research Paper No. 19

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ALBERTA LAW REFORM INSTITUTE

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ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

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PREFACE

Two elements have led the Institute to take a look at activities relating to dispute resolution generally. The first element is the longstanding interest of the Institute in seeking improvements in law, in the administration of justice, and in the procedures and practices by and under which law is applied. The second element is the current groundswell of interest in improving existing dispute resolution processes and experimenting with new or hybrid methods.

As a first step in our own education process, we undertook to identify and describe the dispute resolution methods attracting current attention and to compile a list of dispute resolution projects and resources of recent origin that represent efforts to improve upon or supplement traditional legal means.

The information published in this document is the product of that study. We have decided to publish it now, in descriptive form, without further embellishment because the information is current and, we think, both interesting and potentially useful to members of the practising bar, judiciary and others. Moreover, it supplements the information contained in the report of the Canadian Bar Association (CBA) special Task Force on *Alternative Dispute Resolution: A Canadian Perspective* presented at the Annual Meeting of the CBA in August 1989, and our own research on the use of referees in court proceedings published earlier this year in Research Paper No. 18 (February 1990).

Our agenda for the future is open. The content of this research paper in no way indicates the direction that our future endeavours in this area may take. We would like to receive the comment and advice of readers about what, if anything, we could be doing with a view to law reform in the broad area of dispute resolution.

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DISPUTE RESOLUTION: A DIRECTORY OF METHODS, PROJECTS AND RESOURCES

CHAPTER 1 - INTRODUCTION

A. Introduction

The provision of effective dispute resolution, both within and outside the judicial system, is a matter of considerable current interest and pursuit in Canada.

The present groundswell of interest is attributable in part to the ongoing concern of lawyers, judges, governments and citizens to ensure that disputes are resolved through effective means, for the benefit of the disputants and of society in general. It is attributable in further part to a perceived discontent with the operation of, and access to, the existing judicial system.

The main complaints about the operation of the existing judicial system have to do with a perceived undue emphasis in adjudication on the adversary tradition, and costs and delay associated with the process.[1] These complaints may be less firmly founded in Alberta than they are in some jurisdictions. In Alberta, for example, the judiciary have introduced measures to reduce delay in fixing trial dates.

The perimeters of the movement toward better dispute resolution defy precise definition. "Alternative dispute resolution" or "ADR", as the present search for better dispute resolution methods has come to be labelled, embraces processes for dispute resolution that are truly alternative to the existing judicial system. Rent-a-judge firms and neighbourhood justice centres are two examples. It also encompasses the idea of providing better access to justice by removing the barriers that block or impede the access of some persons to the courts for dispute resolution. This "access-to-justice" approach to ADR extends the movement to include each and every institution and device used to process and prevent disputes, including administrative or bureaucratic solutions. ADR is further understood to envelop processes that modify or improve upon practices and procedures currently in use within the existing court system. The introduction of the concept of the judicial management of cases is relevant here. Pre-trial conferences and compulsory (court-ordered) arbitration are examples.

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1 Andrew J. Pirie, "Dispute Resolution in Canada: Present State, Future Direction" consultation paper for the Law Reform Commission of Canada (Ottawa, April 1987) at 18.

(The origins, evolution and nature of ADR activities are discussed more fully in Chapter 2.)

B. Institute Study

(1) Origin

Early in 1988 the Alberta Law Reform Institute decided to take a look at current activities intended to contribute to the improvement of dispute resolution. Our decision was influenced by the wave of interest ADR is attracting in Canada and elsewhere. Despite the widespread interest, in 1988 most jurisdictions in Canada were just beginning to come to grips with the subject matter. This is evident from the account, in Chapter 2, of the work in dispute resolution undertaken or being planned by governments, law reform commissions and others.

The materials collected in this research paper were prepared to help the Institute acquire a sense of what is meant by ADR, that is, to give some meaning and scope to the terms "dispute resolution" and "alternative dispute resolution", based on historical patterns and modern trends. The materials were also prepared as a first step toward helping the Institute decide how to proceed in this area, or whether to proceed at all.

(2) A Two-Pronged Approach

In fact, we have adopted a two-pronged approach to the subject of dispute resolution. On the one hand, we think it important to work toward the development of a a principled focus for discussion, by developing a framework within which to consider dispute resolution. This research paper consists of information gathered at an early stage of our work toward this goal. On the other hand, while proceeding with the development of a framework for discussion, the Institute has continued to pursue a number of practical projects.

(a) Framework for discussion

The Institute regards it as important to develop a framework for the study of dispute resolution. The development of a framework would, we think, assist the determination of the areas most in need of improved dispute resolution mechanisms and facilitate the selection of specific dispute resolution projects. It is, in our view, essential to know what the big picture might be, to identify the principles being espoused, and then to prepare an inventory of the various options. We want to ascertain the views of experts and to identify the direction of reform trends in order to find out whether a consensus is building up. We

want to consider the relationship between the principles being articulated with respect to access to justice and the reform of the existing judicial system. We want to do this before selecting any dispute resolution projects, or abandoning any such intention.

The publication of this research paper constitutes a modest starting point for the wider, more informed discussion required for the development of a working framework for dispute resolution.

(b) Practical problems

The Institute also regards it as important, while working to define the field of dispute resolution and develop a framework, to identify and keep work going on discrete practical problems. Without approaching them in the context of ADR, the Institute has in fact been pursuing projects covered by the ADR umbrella.

Research Paper No. 18 on *Referees* (accounts and inquiries) was published in February 1990. It was authored by Mr. Jean Cote, now the Honourable Mr. Justice Cote, whom the Institute commissioned prior to his appointment to the Court of Appeal of Alberta. A review of the *Arbitration Act* led to the publication, in July 1987, of Issues Paper No. 1 entitled *Towards a New Arbitration Act for Alberta* and, in October 1988, Report No. 51 containing *Proposals for a New Alberta Arbitration Act*. In 1983, the Institute published Report No. 40 on *Judicial Review of Administrative Action: Application for Review* containing recommendations to make judicial review of administrative action more accessible by streamlining procedures. The recommendations were implemented in 1987, as Part 56.1 of the Alberta Rules of Court promulgated under the authority of section 18(2) of the *Court of Queen's Bench Act*. In 1982, the Institute published Report Nos. 37A and 37B on *Evidence*, a closely related topic.

At the present time, the Institute is conducting a study to determine the feasibility of producing an issues paper on pre-trial discovery. When members of the Civil Practice Advisory Committee of the Law Society and members of the Court of Queen's Bench met with Calgary and Edmonton barristers in the spring of 1989,[2] several of the lawyers present identified discovery as a cause of undue cost and delay in many cases.

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[2] See Chapter 2, at 11.

(3) Reasons for Publication of Research Paper

The materials published in this research paper provide some basic information from which to draw in developing a framework for discussion of the broad area of dispute resolution. First, they give some idea of the potential scope of "dispute resolution" as a subject area. Second, they introduce some of the considerations giving rise to the "alternative dispute resolution" (ADR) movement. Third, they provide information about alternative dispute resolution mechanisms in use, proposed or under experimentation, summarizing various advantages and disadvantages associated with them. Fourth, they provide useful information on existing dispute resolution projects and resources in Alberta, as well as examples of leading ADR projects in other jurisdictions in Canada, and in the United States. In sum, the research materials provide a compendium of information not readily available in another document.

We thought that making this information available in the summary form in which it is presented in this research paper would be useful to the Alberta bar, bench and public. Publication would promote the educational objective advocated by the CBA in the report of the special Task Force on *Alternative Dispute Resolution: A Canadian Perspective* presented in August 1989 at the Annual Meeting of the CBA in Vancouver.[3] It would introduce the reader to the vast scope of ADR, and give some idea of the possible direction of future dispute resolution developments. In this way, publication would help to demystify ADR. The descriptions of ADR methods, projects and resources help show that ADR is not threatening. Indeed, conceived and understood broadly, ADR encompasses many strategies and methods already familiar as existing components of the legal system.

Our first reason, then, for publishing this research paper in its present descriptive form is to inform and educate. Our second reason is to invite comment, as well as information about any major omissions. Our third reason is to set the stage for discussion about the role that the Alberta Law Reform Institute might continue to play in responding to the matter of dispute resolution generally.

C. Form and Content of Research Paper

This research paper consists of four chapters. In Chapter 1, we have provided an introduction to the subject and to the research paper. In Chapter 2, we sketch the origins and evolution of the ADR movement, and explore the current state of ADR activity in Canada. In Chapter 3, we examine various dispute resolution methods. At the

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[3] See p. 5 below.

commencement of the chapter, we discuss of the classification of methods and the factors that affect the choice of method. We then describe five dispute resolution options associated with the ADR movement. The five options are: (i) mediation, (ii) private arbitration, (iii) negotiation/mediation/adjudication hybrids, (iv) court-connected methods of dispute resolution, and (v) the multidoor courthouse (intake screening and diversion). Chapter 4 contains descriptions of specific ADR projects and resources in Alberta, elsewhere in Canada, and in the United States. For Alberta, an attempt has been made to describe all significant ADR projects and resources currently in place. For other jurisdictions, examples are provided; the list is not exhaustive.

D. CBA Task Force Report: A Companion Document

In August 1989, a special Task Force of the Canadian Bar Association presented its report on *Alternative Dispute Resolution: A Canadian Perspective* (the "CBA Report") at the Annual Meeting of the CBA in Vancouver. This landmark study is the product of a national Task Force chaired by Ms. Bonita Thompson, Q.C. of Vancouver. It should be read as a companion document.

The CBA report, predictably, approaches ADR from the perspective of the interest of the legal profession. This perspective shares much in common with that of legislators and law reformers, but does not provide an exact match.

The report is divided into four parts. In Part I, the Task Force has examined the meaning of ADR. In Part II, it has looked at three aspects of ADR in Canada: applications in substantive areas, institutionalization, and education. The discussion of applications in substantive areas covers the seven areas of: labour law, family law, criminal law, environmental law, native law, commercial law and public law. Institutionalization is considered under four heads: the courts, legislation, professional organizations and community organizations. The section on education includes: law schools, continuing legal education, judicial training, the interdisciplinary character of ADR and schools. In Part III, the Task Force has explored six policy issues in ADR. The questions asked are:

(1) what is the role of the legal profession in the development of ADR?

(2) what steps need to be taken to ensure the provision of quality services?

(3) should ADR be attached to the courts?

(4) should ADR be mandatory?

(5) should legislation be used to support ADR?

(6) who should pay for ADR services?

The Task Force recommendations are presented in Part IV of the report. (Part IV is reproduced as an appendix to this Research Paper.)

CHAPTER 2 - THE ADR MOVEMENT

A. Origin of the ADR Movement

The momentum for ADR in North America originated in the United States, where the outcry against the adversary nature of court proceedings and dissatisfaction with the judicial management of disputes has been loudly voiced. The ADR movement has been a major force for change in the United States. It has also influenced thinking, practices and reforms in Canada.

Activity to improve dispute resolution is ongoing throughout the English common world and in legal systems in other jurisdictions characterized by large sophisticated populations and high regulation. Indicative of the ongoing worldwide interest in more effective dispute resolution is the content of a major international comparative law study conducted in the mid-1970's and published in 1978 as the "Florence Access-to-Justice Project". The Project was based in Italy and actually consisted of three interrelated Projects, all conducted under the direction of comparativist Mauro Cappelletti of Stanford University in California and the University of Florence in Italy and, in the case of the American study, co-directed by Professor Earl Johnson Jr. The study was assisted by a host of students from Stanford and Yale. It resulted in the publication of a report, consisting of 6 books divided into 4 topical volumes. The report includes articles contributed by outstanding scholars from around the world. In short, the content of this monumental study provides an excellent starting point from which to examine the subject of dispute resolution.

B. Stages of Evolution

Three waves of the ADR movement are identified in the General Report of the Florence Access-to-Justice Project. To this analysis we have added a fourth or current wave, and a fifth emerging wave.

(1) Infusion of Legal Aid

The first wave of reform began in approximately 1965. It consisted of the infusion into court adjudication of legal aid to assist poor or indigent persons (e.g. by the introduction of legal aid programs, salaried public defenders, or both).[4] In Canada, most

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[4] M. Cappelletti and B. Garth, "General Report", Vol. I, bk. 1, in *Access to Justice* (Italy: Giuffre Editore-Milan, 1979) at 22.

if not all provinces have in place some scheme for the provision of legal aid, although complaints of underfunding are chronic.

(2) Representation of Diffuse Interests

The second wave saw the introduction of attempts to better provide for the legal representation of "diffuse interests", that is, those interests in which no single individual has sufficient interest to warrant pursuing a claim but in which an aggregate of persons have a genuine concern (e.g. environmental or consumer protection). Different approaches to this representation have included a governmental approach, giving standing to private groups to represent the public interest, expansion of the use of class actions, and the bringing of test cases by public interest law groups (e.g. in Canada, by the Public Interest Advocacy Centre, and by the Legal Education Action Fund established to bring to court test cases on Charter issues, particularly those that affect the interests of women).

(3) Emergence of the "Access-to-Justice" Approach

The third wave involved the delineation of a full-fledged "access to justice" approach. As noted in Chapter 1, this approach goes beyond advocacy to focus on the full panoply of institutions and devices, personnel and procedures, used to process and even prevent disputes in modern societies.[5] The approach encourages the exploration of a wide variety of reforms including changes in forms of procedure, the structure of the courts or the creation of new courts, the use of lay persons and para-professionals, substantive law modifications to avoid disputes or facilitate resolutions and the use of private or informal dispute resolution mechanisms. In this wave of the movement, there is recognition that procedural techniques serve social functions, and that procedural regulations have a pronounced effect on how the substantive law operates, how often it is enforced, for whose benefit and with what social impact. The basic task posed for modern civil procedure scholars during this wave of the movement has been said to be to expose the substantive impact of various dispute processing mechanisms and to broaden the focus of dispute resolution by utilizing the insights of sociological, political, psychological, economic and other analyses, as well as to learn from other cultures.

(4) Experimentation and Evaluation

The fourth or current wave involves experimentation with various models of dispute resolution and with variations and combinations of these models in the hope that this will

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5 *Ibid.* at 49.

lead to significant reforms to the manner in which courts function. The importance of experimentation with new methods is mentioned in the General Report of the Florence Access-to-Justice Project. It is also recognized in research work produced for the Law Reform Commission of Canada.[6]

(5) Advancement of Dispute Resolution Theory

The fifth stage, making progress with dispute resolution theory, is signalled by the program announcements of the Fund for Research on Dispute Resolution, headquartered in Washington, D.C.[7] The aim of the Fund is to advance knowledge of disputing. The Fund is calling for projects that have the potential to make contributions to theory by generating new insights and directions, as well as to shed light on the relationship between disputing, dispute resolution and important social problems.

C. ADR Activities in Canada

A sampling of Canadian activity will serve to illustrate the wide range of activity embraced by ADR.

(1) Government

Governments across the country exhibit a continuing desire to ensure effective dispute resolution within their jurisdictions. The province of Alberta is a good example.

In 1989, the Alberta Legislature improved access to justice in small civil claims by raising the monetary limit imposed on the jurisdiction of its Provincial Court from $2,000 to $4,000. This amendment, along with others designed to streamline the procedure, resulted from the work of a committee established in the Attorney General's department. The committee members included representatives of the CBA, the Law Society, the Provincial Court, the Court of Queen's Bench and court services officials.

Presently, the Attorney General of Alberta is working on the implementation of the recommendations of the *Report of the Task Force on Legal Aid*, published in 1989. The Task Force was created jointly by the Attorney General of Alberta, the Law Society of Alberta and the Legal Aid Society of Alberta. The terms of reference included a review of Legal Aid programs and services, priorities among those services, the manner of delivery of legal

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6 See Pirie, *supra*, note 1.

7 For more information on the Fund, see p. 14 below.

aid to the public, and the structure of the relationship between the Law Society, Attorney General and Legal Aid Society.

The Attorney General also provides closed custody mediation services in the judicial districts of Calgary and Edmonton, and subsidizes the cost of an open assessment in cases of financial need in certain Court of Queen's Bench and Surrogate actions where custody of or access to children, or both, is in issue.

Two examples of government activity in other provinces are the recent comprehensive reviews of the structure of the courts in Ontario and British Columbia.

In Ontario, the Attorney General currently is moving on the implementation of recommendations contained in the *Report of the Ontario Courts Inquiry* issued in 1987. The Honourable T.G. Zuber, Justice of the Supreme Court of Ontario conducted the inquiry. His mandate was to inquire into matters affecting the accessibility of and the service to the public provided by all of the Ontario courts including, specifically, their jurisdiction, structure, organization, sittings, case scheduling and workload. He was to make recommendations concerning the provision of a simpler, more convenient, more expeditious and less costly system of courts. The reform now under way is intended to streamline the Ontario court system, improve case management in civil cases and reduce delay in criminal cases. Dispute resolution alternatives outside the courts are also being investigated. Three initiatives deserve note: (1) the Legislature's Standing Committee on the Administration of Justice conducted three weeks of hearings on alternative dispute resolution during the spring of 1990; (2) the Attorney General announced the establishment of a $1.125 million Fund for Dispute Resolution in March 1990;[8] and (3) a family mediation test project is being developed to compare the results of mediation with the results of litigation in two Ontario locations. (The Ontario Attorney-General has publicly advocated streamlining the court system and diverting from it cases between private parties involving little or no public interest.)

In British Columbia, the Attorney General is looking at recommendations published in 1988 in *Access to Justice*, the Report of the Justice Reform Committee. The goal given to this Committee, established under the Deputy Attorney General, was "to cause the justice system of the Province of British Columbia to be accessible, understandable, relevant and efficient to all those it seeks to serve." The Committee was mandated "to investigate the attitudes of citizens towards the justice system and address any dissatisfactions which may be felt on account of the system being too complicated, too costly, or too slow." In August

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[8] For more information, see p. 13 below.

1989 the Attorney General announced a plan, consistent with recommendations in the Report, to introduce a number of new computer technologies to improve the judicial system. The technologies include a computerized trial scheduling system and an expert system to help the general public in using the small claims court.

(2) Legal Profession

There has been much activity recently in Canadian legal circles. In 1988, the Alberta Benchers created a committee to deal with family law and mediation services.[9] In 1989, the Civil Practice Advisory Committee, a standing committee of the Law Society, joined members of the Court of Queen's Bench at meetings with civil litigation practitioners in Edmonton and Calgary. The topic of discussion was "Overcoming Delays in the Judicial Process". The meetings provided the Committee and the Court with an opportunity to report to the litigation bar on this topic and to elicit the comments of the bar. Reference was made previously to the involvement of the Law Society of Alberta in recommending reform in the areas of small claims and legal aid.

In August 1989, a special Task Force of the Canadian Bar Association (CBA) presented its report on *Alternative Dispute Resolution: A Canadian Perspective* at the Annual Meeting of the CBA in Vancouver. (The contents of this study are described in greater length above, at page 5.) The CBA also supports the reform of trial process. Resolution no. 32, passed at the 1989 Annual Meeting, states that the CBA:

> ... supports reform in the trial and chamber's process, particularly in the rules of procedure, the rules of evidence, and the conduct of multiple-party law suits procedures in order to shorten, simplify and reduce the cost of the trial process.

Corresponding in nature to this resolution, the national Civil Litigation section has launched a project jointly with the Criminal Law and Constitutional Law sections to study recent developments in the area of court reform.

Provincial CBA branches have also been active. The CBA Ontario, for example, has convened an ADR Committee; the British Columbia branch made the provision of efficient and affordable legal services its main goal for 1989-90.

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9 Law Society of Alberta *Newsletter*, January/February 1988, at 2.

The Canadian Institute for the Administration of Justice is also involved. It has initiated an on-going public opinion research survey designed to track changing public perceptions of the administration of justice in Canada.

(3) Judiciary

The judiciary are taking steps, on a continuing basis, to ensure the efficient and effective administration of justice in the courts. Members of the judiciary in Ontario and British Columbia took part in the comprehensive reviews of the jurisdiction, structure and operation of the courts undertaken recently in those provinces, and government officials are now working on the implementation of the resulting recommendations. In Alberta representatives of the Alberta Court of Queen's Bench recently joined members of the Civil Practice Advisory Committee in the meetings with civil litigation practitioners in Calgary and Edmonton to talk about overcoming delays in the judicial process and thereby help to ensure the ongoing efficiency and effectiveness of the courts. The improvements with respect to fixing trial dates and eliminating backlog and delays introduced by the Honourable W.K. Moore, Chief Justice of the Alberta Court of Queen's Bench after his appointment provide another illustration of the active involvement of the judiciary in Alberta. Chief Justice Moore has also promoted the attendance of justices at Case Flow Management Seminars.

(4) Law Reform Agencies

Law reform bodies are interested. At the national level, the Law Reform Commission of Canada has included "Better Dispute Resolution" in its proposed research program. An object of the program, if undertaken, would be to promote more cooperation and compromise in litigation, and less confrontation and combativeness. The project would study the federal and theoretical aspects of the current system of dispute resolution as well as alternative methods of dispute resolution. The key purpose would be to increase citizen access to and satisfaction from the justice system, both procedurally and substantively, by reducing the costs and delays in the resolution of conflict and by eliminating unwanted confrontation and bureaucratic or procedural complications. New channels for dispute resolution would be developed, and new attitudes toward disputation fostered. The ultimate goal would be to mold a dispute resolution system that will come to reflect more accurately the enduring values of Canadian society.[10]

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10 A.M. Linden, "Some Thoughts about the Future Research of the Law Reform Commission of Canada" in *The Future of Law Reform*, Joyce Miller, ed., transcript of a seminar held by the Law Reform Commission in Ottawa, May 23, 1986. The Honourable Mr. Justice Linden is President of the Commission.

Provincially, the Ontario Law Reform Commission has expressed a willingness to undertake work on dispute resolution, and has done some internal research. However, it has not received a reference from the Ontario Attorney General to proceed. The British Columbia Law Reform Commission is also interested. In its response to the report of the BC Justice Reform Committee, that Commission drew attention to several projects - past, present and proposed - that embrace aspects of dispute resolution.

(5) Community Organizations

Cultural, religious and other community organizations have been responsible for instituting ADR projects in some communities. An Alberta example is the Saddle Lake Tribal Justice Research Centre.

(6) Funding Bodies

Public and private funding bodies are encouraging research and experimentation in dispute resolution. In Alberta, the Alberta Law Foundation has been a active player, providing funding to get organizations such as the Alberta Arbitration and Mediation Society off the ground.

Nationally, the Donner Foundation has funded at least seven projects over the last decade or so, in amounts totalling at least $825,000. Among the projects that have received funding are: a two-year pilot project to assess the viability and effectiveness of a mediation centre as an alternative means of settling minor disputes; a pioneering study conducted by a specialist in the social psychology of law to compare dispute-handling by litigants and non-litigants; a centre for the dissemination of information on the legal alternatives to injustice or indifference to children; three-year support to a research and resource program for prepaid legal services; and a centre to serve as a research and resource centre on plain language information, manuals and sample documents.

In March 1990, the Ontario Attorney General announced the creation of a $1.125 million Fund for Dispute Resolution to "provide incentives to lawyers, social scientists and community justice advocates to carry out research and evaluation in the field of alternative dispute resolution" over the next four years. The contributors to the fund, the establishment of which represents an opportunity for cooperation between government and the private sector, are the Ministry of the Attorney General, the Donner Canadian Foundation and the Law Foundation of Ontario.

The Fund for Research on Dispute Resolution, supported by the Ford Foundation and affiliated with the National Institute for Dispute Resolution headquartered in Washington, D.C., recently announced its 1990 program. The special initiative for 1990 encourages research on disputing and dispute resolution focusing on minorities, the poor, the underclass and dependent populations. The Fund, made up of approximately $800,000 (U.S.), is requesting proposals from Canadian researchers.

(7) Educational Initiatives[11]

Educational initiatives are being taken in many jurisdictions. In 1989, seven law schools offered specific courses in alternative dispute resolution. In Ontario, the bar admission program is being revised to contain a significant emphasis on negotiation and mediation. Many continuing legal education organizations have offered courses on ADR topics such as negotiation, labour arbitration and commercial arbitration. In several jurisdictions judges have sought out training in mediation theory and skills, and it is expected that the new Canadian Judicial Centre at the University of Ottawa will make a further contribution.

Beyond the legal community, universities and colleges are offering students opportunities to learn about effective management and resolution of conflict in faculties and departments such as business administration, criminology, education, human and social development, nursing, psychology, public administration and social work. Interest in ADR education is also growing in the public schools. Successful public education would improve public knowledge about legal rights and ways to enforce them, including the use of ADR methods.

In Alberta the Legal Resource Centre, established in 1975 with the assistance of funding from the Alberta Law Foundation, has the purpose of increasing public concern for and involvement in the law. The Centre has featured mediation and arbitration methods, projects and resources in articles published in its monthly magazine, *Lawnow* (formerly *Resource News*).[12] In southern Alberta, Calgary Legal Guidance serves the community through legal advice clinics for those on low incomes, public legal education programs and involvement with other service agencies. Its public legal education activities include the establishment of a Dial-A-Law service, available toll free province-wide. The Public Legal Education Network of Alberta, an association of organizations carrying on public legal

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11 For a fuller discussion of educational initiatives from which much of this discussion is drawn, see the CBA Report (referred to above at p. 5) at 44-51.

12 See e.g., Vol. 12, No. 2 (October 1987).

education activities since 1980 although only incorporated in 1989, helps to increase access to legal information in this province by assisting member agencies to become better informed of each other's activities.

(8) ADR Conferences

Conferences are being held across Canada to explore various ADR topics. One example is the invitational conference *Access to Civil Justice* hosted by the Attorney General of Ontario in June 1988. The conference, convened to canvass the current state of ADR in Canada, was broad in content. The program was divided into three key segments. The first segment was spent examining 'Barriers to Access'. Following the 'Opening Plenary on Confronting the Problem', participants separated into workshops with names such as: minority voice, gender, literacy & legal language, proce[illegible]l barriers, native & remote justice, public legal education, physical & mental disabili[illegible]anguage rights, and intervenor status & funding. The second segment was devoted to consideration of the 'Cost of Justice'. The workshops in that segment had names such as: Zuber and beyond, poverty lawyering, lawyers' fees, paralegals, legal aid, legal insurance, contingency fees, middle class difficulties, and community clinics. The third segment was 'Transformations in Justice'. The workshops in that segment included: access to appointments, neighbourhood & lay justice, privatization, mediation, arbitration, native courts, administrative tribunals, and group claims/collective rights. The topic of 'The Challenge Ahead' was addressed in the Closing Plenary.

A second example is the national seminar *Implications of Technology in the Law and the Courts*, sponsored by the Canadian Institute for the Administration of Justice in 1989. The program included demonstrations of several legal databases, automated courts case tracking systems, pre-trial conference by video, and the paperless courthouse. It also included three demonstrations of the court rooms of the future: a video court room (trial with participants in separate rooms); a computerized court room (mock trial); and a lecture and demonstration of computerized transcript retrieval in long, complex trials.

(9) Collaborative Research Projects

Collaborative research projects are being conceived. A leading example is the trial process study proposed by the Law Reform Commission of Canada, in conjunction with the Canadian Judicial Council and the Canadian Bar Association. Unfortunately, commencement of the study has been put on hold. If conducted, the study would collect and analyze information about trial court practices and procedures in the section 96 courts of the provinces and territories to give the bar, judiciary and government a current nation-

wide assessment of section 96 court operations. The assessment would focus on practices that reduce delays in and costs of the trial process. Information would be gathered in seven areas: procedures and practices (civil/criminal); administrative machinery for managing the trial process; role of lawyers; pace and cost of litigation; baseline data; views and ideas of participants (judiciary/bar/Crown counsel/court administration/Attorneys General); and appraisal of selective reforms (new techniques and procedures that earn praise and excite curiosity.

CHAPTER 3 - ADR METHODS

In this chapter, we will describe six methods of third party intervention, three basic, and three hybrid. The descriptions follow a discussion of the classification of dispute resolution methods, and of the factors that affect the choice of method. Any attempt at classification of the different methods of third party intervention for dispute resolution is by necessity overlapping, as many of the methods share characteristics with others. However, the general scheme employed for the methods described in this chapter is to move from the least intrusive to the most intrusive forms of intervention in disputes.

A. Classification of Methods

(1) Consensual Resolution to Formal Adjudication

Dispute resolution in individual cases can be approached in a number of ways. One approach is to see a continuum running from consensual resolution at one end to formal binding third party adjudication at the other.

The concept of consensual resolution embraces negotiation, mediation, and therapeutic intervention. Negotiation is the most common form of dispute resolution. It is also considered to be the superior option, in terms of reducing costs (both public and private), efficiency, and flexibility in that disputants can control the entire process and outcome themselves. The negotiation model embraces inducements for reasonable settlements (e.g. best offer).

In cases where private negotiations are not successful, then the option of third party intervention is the next step to consider. Third party intervention in a dispute can vary greatly, on a continuum ranging from the minimal intervention of a mediator, acting as a facilitator to help disputants settle their dispute between themselves, to the maximum intervention of an adjudicator, acting as a decision-maker who imposes a resolution on disputants.

In the mediation model, the parties define the issue, come to understand each other's position and come to terms with the problem. The therapeutic model is a form of mediation in which the relationship is repaired, personal skills for coping and dealing with problems improved. An extension would include individual therapy.

The concept of adjudication embraces adversarial and inquisitorial dispute resolution and arbitration. The adversarial model is utilized in the existing court system; under the

adversarial model the parties handle the investigation and presentation of their cases. The inquisitorial model involves more judicial management; the decisionmaker investigates, defines the issues and assesses the defences. In arbitration the proceedings are less formal. The parties may participate in the choice of decisionmaker or mediated discussion before the arbitrator is put to making a decision.

There are also myriad variations and hybrid methods. Some of them do not fit well within any one of these models. Examples of methods that are difficult to classify include: rent-a-judge, neutral expert fact-finding, court-administered arbitration, mini-trial, pre-trial conference, ombudsman, summary jury trial, managerial judges, med-arb process, and court appeals management plan (CAMP).[13] Some of these methods operate within, or in association with, the court system while others do not.

(2) Distinguishing Features

Many other bases for distinction exist. In a chart comparing various methods of dispute resolution, Goldberg, Green and Sanders[14] compare seven characteristics: voluntary or non-voluntary (i.e. whether the method is employed by choice or its use compelled); binding or non-binding; third party (e.g. the third party involved may be imposed or party-selected, have expertise in the area of dispute or not, be a neutral decisionmaker or outside facilitator); degree of formality; nature of proceeding (e.g. strict rules governing opportunity to present proofs and arguments or unbounded presentation of evidence, arguments and interests); outcome (e.g. a principled decision supported by reasoned opinion or a mutually acceptable agreement); and private or public.

(3) Relationship Between Methods

The methods of dispute resolution do not necessarily operate independently of each other. They may be interrelated in a number of ways. A leading Canadian expert discusses three approaches to the interrelationship of various methods - the choice model, the linear model and the integrated model.[15]

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13 Pirie, *supra*, note 1 at 18.

14 Stephen B. Goldberg, Eric D. Green, and Frank E.A. Sander, *Dispute Resolution*, (1985, Little, Brown and Company Law Book Division, Boston) at 8-9.

15 Pirie, *supra*, note 1 at 11.

(a) Choice model

In this model disputants select the model by which they wish their dispute to be resolved.

(b) Linear model

In this model a hierarchial relationship is set up between the dispute resolution methods. As one moves from negotiation to adjudication, the settlement of conflicts becomes more dependent on third party participation. There is a progression from process to process (although all may not be tried and exhausted). Some have argued that this is a false model because the process is in fact one-step, beginning and ending at adjudication, given lawyer training[16] and prevailing social values.[17] It is highly likely that settlements are strongly influenced by the adversarial characteristics of the current adjudicative process rather than a true application of negotiation or mediation.

(c) Integrated model

The integrated model requires movement away from a unitary orientation. It involves the creative application of existing processes and new hybrids. The adoption of this model involves recognition that conflicts are multi-dimensional; that there are usually many issues at stake; and that the issues may involve substantive, procedural or psychological features. Conflict resolution would be based on the fullest possible integration between the issues and processes. Simultaneous applications of various processes to the whole or any part of the dispute would be encouraged. The presumption underlying this model is that all the disputing processes and their hybrids have the potential to impart benefits to the resolution of a dispute.

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16 Chief Justice Warren Burger, "Isn't There a Better Way?" (1982) 68 A.B.A.J. 274, the annual report on the state of the judiciary given by the then Chief Justice to the American Bar Association in Chicago; Derek C. Bok, "A Flawed System of Law Practice and Training" (1983) 33 Journal of Legal Education 570, the report of the President to Harvard's Board of Overseers in 1982.

17 Jerold S. Auerbach, *Justice Without Law?* (New York, 1983).

B. Factors Affecting Choice of Method

Various factors may affect the choice of dispute resolution method. They include: matching a dispute with a process;[18] the strength of the "interpersonal" dimension of the dispute (i.e. interpersonal or impersonal relationship between the disputants); the nature of the dispute; the amount at stake; the speed of resolution; the cost involved; the relative power of the disputants; the relative knowledge of the disputants; the relative financial resources of the disputants; the mechanisms for steering disputants and intermediaries to the right choice; the relationship between dispute resolution methods (i.e. linear, hierarchial model, or integrated); the incentives for use of alternative methods; and the attitudes of lawyers and judges.

C. Mediation

(1) General

(a) Defined

Mediation is a process by which a neutral third party assists parties in a dispute to reach a settlement. The mediator's role is that of a facilitator, not an adjudicator: the decision is reached by the parties themselves. Thus, mediation is the least intrusive form of third party involvement in a dispute. The mediator controls and structures the negotiations, defuses emotional tensions, and keeps the channels of communication open, thus increasing the chances of settlement of the dispute by the parties. Once agreement is reached, it is enforceable as a contract between the parties.

(b) Variations

Mediation is generally non-binding and non-coercive, but it can be made mandatory to enter mediation (though not to reach an agreement). As well, mediation could be annexed to the court system, so as to become a judgment of the court if agreement is reached. The parties may define the issues to be settled themselves, or the mediator may assist them in this regard. Finally, the extent to which the mediator interferes in the negotiation process can vary widely, on a continuum ranging from merely acting as a chairperson, to a very structured negotiation process in which the mediator may go so far as to suggest settlements to the parties.

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[18] Pirie, *supra*, note 1 at 12. There is no empirical evidence that one process is most effective for a particular dispute.

(c) Perceived advantages

When used in the contest of ongoing relationships, mediation allows underlying issues and emotions to be addressed and resolved, and so allows the relationship to be continued in the future. Thus, mediation is commonly used in the area of family law. As the decision is reached by the parties to the dispute instead of being imposed on them, there is greater satisfaction with the dispute resolution process and outcome, and consequently, greater compliance with the result. The process is less confrontational than adjudication, and so reduces the likelihood of a win or lose mentality, and provides a framework for future disputes between the parties. As opposed to adjudication, mediation is faster, cheaper, and less formalized, both in terms of process and in tailoring results. This increased flexibility allows the needs of particular parties to be addressed.

(d) Perceived disadvantages and limitations

Mediation may be inappropriate where parties to a dispute are at an imbalance of power, or where there is a history of physical violence, as one may intimidate the other. In addition, if mediation fails and adjudication follows, it has added another step to the process, thus increasing time and money spent. Unrepresented parties may be at a disadvantage against represented parties in mediation. It is also questionable whether the perceived advantages of mediation are possible if the process is involuntary. If mediation is voluntary, it would only be useful if the parties are predisposed to settle, and those types of parties would probably reach settlement on their own. There are concerns regarding the ability and qualifications of mediators, and whether they should be subject to professional standards. Finally, the use of mediators as an alternative to court adjudication may result in a second class justice for low-income and disadvantaged groups.

(2) Requiring Lawyers to Suggest Mediation?

(a) The suggestion

Section 9(2) of the new federal *Divorce Act* 1985 requires lawyers who undertake to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating support or custody matters, and to inform the spouse of mediation services that might assist the spouses in negotiating such matters. This type of legislation could be extended to other areas in which mediation services are available (e.g. other family disputes or in the community context).

(b) Perceived advantages

Legislation could increase awareness of the possibility of mediation as a method of dispute resolution.

(c) Perceived disadvantages and limitations

Legislation would have little practical effect unless lawyers are committed to the cause, which seems unlikely if they are sending business away by suggesting mediation. It is also arguable whether suggesting voluntary mediation would have any effect if the parties are not predisposed to negotiation.

(3) An Application: Neighbourhood Justice Centre (NJCs)

(a) Definition

Born in the 1970's in the United States, NJCs (also known as Neighbourhood Dispute Resolution Centres or Community Boards) are designed to resolve minor, interpersonal disputes in the community through mediation. They usually concentrate on disputes between people with an ongoing relationship such as neighbours, landlords and tenants, family disputes, and minor criminal offences within the neighbourhood. The decision to mediate is voluntary, subject to the caution that in a referral from the criminal justice system the pressure to take part in mediation may be heavy.

(b) Variations

NJCs vary in the type of cases they handle, some covering a very broad area, including civil and criminal matters, and others restricted to specific types of disputes, such as criminal, domestic, or consumer. Disputants may be referred to NJCs from a variety of sources such as by the disputants themselves, police, prosecutors, judges, lawyers, or social workers. Requirements for mediators vary. They may be required to be resident in the neighbourhood of the NJC, to take varying amounts of training to be mediators, or to have some degree of experience in mediation. Mediators are almost always volunteers. Funding of NJCs commonly consists of grants from private foundations or public sources. Most do not charge a fee to disputants for using NJC resources. NJCs generally employ the technique of mediation only, and not arbitration. However, although the process is still called mediation, in the context of referrals from the criminal justice system, it may be more illusion than reality to suppose that offenders really agree with the results of the mediation.

(c) Perceived advantages

NJCs increase access to justice, as the process is prompt, informal, and reduces or eliminates legal costs to the disputants. They improve efficiency, in that the courts are left free to attend to more serious cases. They are a better process than adjudication in the context of ongoing relationships, as they allow disputants to get at the underlying problems between them. In addition, NJCs are of benefit to the community, as they increase citizen participation, reduce community tensions, and help restore a lost sense of community.

(d) Perceived disadvantages and limitations

NJCs are used to increase social control over lower-income and disadvantaged groups by the powerful through referrals of minor criminal matters and other disputes. NJCs are also a form of second-class justice for lower income groups who cannot afford to use the court system, which becomes the preserve of the rich. Important precedents are lost when NJCs are used instead of the court system and because NJCs are used predominantly by disadvantaged groups, this perpetuates the disadvantages, by delaying social change through the common law. In addition, it has not been proven that any of the goals of NJCs, particularly the community-related goals, have been attained.

(4) Investigative Mediatory Hybrids

(a) General

Ombudspersons perform a mixture of investigative and mediatory functions, to resolve disputes outside of the judicial system. Generally, an independent officer of the government, the ombudsperson investigates complaints of administrative injustice and maladministration, and attempts to mediate disputes between members of the public and the government. This type of hybrid investigative mediatory role could be extended to areas outside of government, such as where there is a public interest involvement in the context of an imbalance of power. Consumer complaints would be an example.

(b) Perceived advantages

This would allow resolution of disputes without the onus and expense being entirely on the injured party, thus increasing access to justice.

(c) Perceived disadvantages and limitations

An ombudsperson-type function may not be effective unless the more powerful party involved in the dispute has an interest in considering the ombudsperson's findings and attempts at mediation, as is the case with the government ombudsperson. It is also questionable whether it is appropriate for the taxpayers to pay to solve people's problems in this way, especially where they may be partly at fault. In addition, making it so easy for a complainant to have a dispute brought forward may result in large numbers of trivial complaints being lodged, with little merit or value.

D. Private Arbitration

(1) Definition

Adjudication is a dispute resolution process in which a dispute is submitted through presentation of evidence and arguments to an adjudicator, who renders a decision. Private arbitration includes only private, voluntary methods of adjudication. Disputes can be submitted to arbitration by agreement of the parties after the dispute has arisen, or, more commonly, because they have previously agreed to do so in the event of a dispute. Thus, arbitration is common in the context of ongoing, contractual relationships. The parties decide for themselves the identity and number of arbitrators, the procedure to be followed in the process, on what the decision is to be based, and the extent to which the decision may be challenged. Arbitration awards will always be subject to judicial review on the basis of arbitrators misconduct, infringement of natural justice, or if one party has been deceitful. Further, if there is an error on the face of the award, or if new evidence has come to light, the award generally may be challenged. If the parties do not adequately define the necessary elements in their agreement to arbitrate, the *Arbitration Act* provides a fall-back position. It also provides for enforcement of arbitration awards upon application, and court supervision of arbitration. The present state of the law of arbitration in Alberta is summarized in the Alberta Law Reform Institute's Issues Paper No. 1, *Towards a New Arbitration Act for Alberta*.[19]

(2) Variations

There may be a single arbitrator or a panel. In the absence of agreement, the *Arbitration Act* section 1 of the Schedule provides that there shall be a single arbitrator. The

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19 The Institute's published recommendations on arbitration in Report No. 51 entitled *Proposals for a New Alberta Arbitration Act* (October 1988).

objective standards on which the arbitrator's award is to be based can be agreed to be: the contract between the parties; the custom of a trade; the applicable law; or some combination of these. Often, though not necessarily, the arbitrator is an expert in the field in which the dispute arose. Arbitration can be under a "high-low contract," which means that the limits of recovery and loss are bounded by agreement of the parties. This converts a win or lose situation to a partial win or partial lose situation. "Final offer arbitration" occurs when both disputants submit their best offer to the arbitrator, who then either picks one, or picks the one that is closest to the arbitrator's own determination. This encourages reasonable offers by both parties.

(3) Perceived Advantages

Arbitration may allow a dispute to remain private, and the publicity inevitably associated with litigation may be avoided. The public interest is also served because the parties bear the costs of arbitration themselves. Arbitration is more flexible than litigation. The parties have control over their own dispute, the procedures followed and the principles applied to resolve it. This increases the satisfaction of the disputants with the process and the outcome. Arbitration is also faster, and consequently, less expensive, than litigation. There is no precedent value in the decision reached, so a concern for future cases will not impact on the decision. As the procedure can be designed to be far less formal and intimidating than court, the confrontational atmosphere of the dispute is diminished. This is especially important in maintaining ongoing business relationships. If experts are used as arbitrators, the process should be more efficient, and results may be more in accord (or perceived to be more in accord) with the expectations of the parties, when they are in the same field as the expert.

(4) Perceived Disadvantages and Limitations

Arbitration may not always be faster, less expensive, and less formal. It may be more expensive and time-consuming than litigation, if the arbitration agreement, choice or conduct of arbitrators, procedure, or award are challenged. In addition, there are concerns regarding ability and qualifications of arbitrators, and whether they should be subject to professional standards. Generally, arbitral decisions are not reviewable for errors of fact or law, which may lead to unfair results.

E. Negotiation/Mediation/Adjudication Hybrids

(1) Introduction

Use of hybrids in which various combinations of dispute resolution techniques may be employed, recognizes that one particular method or another may not always be suited to a particular dispute. Viewing negotiation, mediation and adjudication as separate and distinct processes may not only be misleading, but may also discourage the most efficient resolution of disputes. Hybrids allow the flexibility to deal with disputes in the way best suited to the type of dispute and the disputants involved.

(2) The Mini-Trial

(a) Definition

The mini-trial is a voluntary dispute resolution process that involves a blend of procedure that appears at once like mediation and adjudication, and a result that may be either a negotiated settlement or a non-binding arbitration. Commonly used for intercorporate disputes, the procedure of the mini-trial may vary, but the following steps are usually involved.[20] First, the parties voluntarily agree to conduct a mini-trial. A procedural agreement, which may vary in its level of complexity, is usually drawn up between the parties, outlining their obligations, right to terminate the process, confidentiality, and effect on any litigation. Before the mini-trial there is an exchange of documents, without prejudice to any litigation if the mini-trial is unsuccessful. The parties select a neutral advisor, often a retired judge or expert in the matter of the dispute, to preside over the mini-trial. The advisor's role is that of a facilitator in the proceedings, as in mediation. However, if settlement is not reached, the advisor may be asked what the likely trial outcome would be, and so acts then as an arbitrator in a non-binding arbitration. At the mini-trial, lawyers for each side make summary presentations, generally in the range of one to six hours. Witnesses, experts or key documents generally may be used. The rules of evidence do not apply; formats may vary greatly, depending on the procedural agreement. The presentations are made to high level representatives of each party, who have clear settlement authority. These representatives, usually at least one level higher in the corporate hierarchy than those involved in the dispute, observe and ask questions, and then meet after the presentations to try to settle the dispute. If no settlement is reached immediately after the mini-trial, further negotiations may follow, or the parties may request

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20 Goldberg *et al.*, *supra*, note 14 at 272-74.

the neutral advisor's opinion, which they may accept or modify in further negotiations. Once an agreement is reached, it is enforceable as a contract between the parties.

(b) Variations

The procedure employed, as specified in the parties' procedural agreement, may vary greatly. In Zurich for example, the 1984 Chamber of Commerce established a public mini-trial forum and panel with its own procedural rules, with the Zurich Centre for Public Resources Acting as Administrator.[21] Alternatively, a neutral advisor may be dispensed with and the proceedings instead presided over by the high level representatives of each party. The role of the neutral advisor in the proceedings may vary, from merely chairing the proceedings, to active mediation, to advising on likely trial outcomes.

(c) Perceived advantages

The mini-trial provides both parties with further information, in light of which negotiations are more likely to be successful. In addition, use of high level representatives not directly involved in the dispute allows calm appraisal of positions and mutually beneficial settlements, rather than acting on emotional or face-saving motivations, as might those deeply involved in the dispute. The flexibility of the mini-trial allows the process to be tailored to the issues in the case; for example, experts may be employed as the neutral advisor in cases involving difficult technical or economic factual issues. A mini-trial also decreases the business uncertainty caused by litigation, as well as its costs to ongoing business relationships. The costs of the mini-trial are far less than litigation, and may not be wasted entirely even if litigation still ensues, because although the proceedings and outcome of the mini-trial are generally confidential, most of the preparation can also be used as trial preparation.

(d) Perceived disadvantages and limitations

The mini-trial may be inappropriate where a case turns solely or largely on legal issues; it is suited primarily to cases involving complex questions of mixed law and fact. Also, if litigation ensues, the mini-trial has added more expense and delay to resolving the dispute.

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21 *Ibid.* at 275.

(3) Med/Arb

(a) Definition

Med/Arb is a process by which the same person serves both as meditor and arbitrator, such that if mediation does not yield a settlement, the mediator switches roles from mediator to arbitrator, and imposes a decision. Med/Arb is commonly used in labour disputes in the United States.

(b) Variations

Med/Arb may involve tripartite arbitration, in which one "arbitrator" appointed by each party serves on a panel of three with a neutral arbitrator. A variant suggested by Goldberg and Brett,[22] to prevent problems of role confusion, is to have a neutral party act first as a mediator and then as an "advisory arbitrator" (ie., in a non-binding arbitration). If this fails, arbitration follows but uses a different person as arbitrator. Thus, the adjudicative role of the arbitrator is not compromised. A variant used in California in child custody cases[23] is to have the mediator recommend a decision to a decision-making body in the event that mediation fails.

(c) Perceived advantages

There is less posturing by parties in the mediation process when the mediator also has the power of a decision-maker, as parties are more likely to attempt serious and reasonable negotiations. In addition, the parties will reach better agreement by themselves in Med/Arb than would be imposed with arbitration alone.

(d) Perceived disadvantages and limitations

If the same person acts as both mediator and arbitrator, and mediation fails, the adjudicative role of the arbitrator has been compromised, in that information learned while acting as mediator may affect, or appear to affect, the decision made.

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22 *Ibid.* at 246.

23 *Ibid.* at 247.

F. Court-Connected Methods of Dispute Resolution

(1) Introduction

"Court-connected methods of dispute resolution" includes all methods that are initiated by or through the court system, whether or not they are operated by the court. They are organized from the least coercive to the most coercive methods.

(2) The Pre-Trial Conference as Settlement-Promoter

(a) Definition

The pre-trial conference is an informal dialogue or series of dialogues between counsel and a judge prior to trial. They can be primarily trial preparation-oriented (as in Alberta), or primarily settlement-oriented (as in Ontario). With the former, settlement may occur as a by-product of refining and discussing the issues; with the latter, settlement is the goal, and the pre-trial conference judge's role approaches that of a mediator. Rule 219 in Alberta allows the court, on application of a party or on its own motion, to direct that a pre-trial conference be held to consider, among other things, "any other matters that may aid in the disposition of the action, cause or matter" (R. 219(1)(d)); this allows settlement to be considered. This differs from Ontario, where "the possibility of settlement of any or all of the issues in the proceeding" (R. 50.0(a)) is specifically listed, at the head of the list, as one of the things that may be considered in the pre-trial conference. Further, in Alberta, the judge who conducts the pre-trial can also be the trial judge (R. 219(4)); this is not the case in Ontario (R. 50.04).

The Alberta pre-trial conference could move toward the Ontario model to emphasize settlement. The study of experimental pre-trial conferences in Ontario showed that with the Ontario settlement-oriented pre-trial conference, the rate of settlement increased by approximately 10%, and the overall productivity of the court was increased by 15%.[24] It has been noted[25] that it is unlikely that pre-trial conferences that are trial preparation-oriented would have the same results. In fact, an American study[26] of the New Jersey pre-

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24 Holland, "Pre-Trial Conferences in Canada" (1987) 7 Adv. Q. 416 at 417.

25 Watson, Paper delivered to the Conference on Expeditious Justice, Edmonton 1978; Loeschmann, "'Time, Gentlemen, Time': Pre-Trial Conference Procedures in the Supreme Court of British Columbia", 18 U.B.C.L. Rev. 163.

26 Rosenberg, *The Pre-Trial Conference and Effective Justice*, Columbia University Press, 1964.

trial conference, which is trial preparation-oriented, found that the pre-trial conference system did not lead to an increase in the number of cases settled, and that they were an inefficient use of judicial time.

(b) Variations

Sanctions could be imposed on counsel for non-appearance at the pre-trial conference, or for not being prepared, as is done under the Maine Rule of Civil Procedure (R. 16(c)(5)). Conference telephone calls could also be used where it is difficult for all the parties, counsel and judge to get together. To prevent junior lawyers who are not really involved in the case from being sent, the rule could require trial counsel to be present at the pre-trial conference.

(c) Perceived advantages

A settlement-oriented pre-trial conference system would increase the rate of settlement, with all its benefits such as savings in costs (both public and private), time, and avoiding the strain of trial.

(d) Perceived disadvantages and limitations

The effectiveness of pre-trial conferences in promoting settlement depends upon the experience of the judge, the known objectivity of the judge, and the willingness of the judge to participate in the process. Thus, even under the settlement-oriented approach of Ontario, particular judges may actually lower the rate of settlement from what it would have been if there had been no pre-trial conference.[27] Therefore, whether the pre-trial conference could be used to promote more settlement in Alberta would require study, and perhaps change, of judicial attitudes. In order to move Alberta pre-trial conferences to a settlement-orientation, it would also be necessary to prohibit pre-trial judges from being the trial judge, as in Ontario, so that the adjudicative role is not compromised by having previously attempted to mediate the same dispute. This may be difficult in smaller centres. Finally, the presence of court-run settlement conferences may delay or discourage private attempts at settlement.

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[27] Holland, *supra*, note 24 at 428.

(3) A Voluntary, Non-Binding Arbitration: The B.C. Mini-Trial

(a) Definition

The mini-trial and the quantum mini-trial for damages issues are voluntary, pre-trial methods of dispute resolution available in British Columbia, that resemble a non-binding arbitration. In this off-the-record procedure, counsel present a summary form of argument to a judge in the presence of their clients. Soon after, the judge gives an oral or written opinion, which is non-binding and cannot be mentioned at trial if a trial still ensues. Further, the mini-trial judge cannot act as the trial judge for the same dispute. The opinion given acts as an impetus to settle.

(b) Variations

Cost sanctions could be imposed on parties that use the mini-trial and proceed to trial but do not improve their position.

(c) Perceived advantages

The mini-trial allows an objective appraisal by a judge, which should promote settlement, with all of its advantages such as savings in costs (both public and private), time, and avoiding the strain and uncertainty of trial.

(d) Perceived disadvantages and limitations

The mini-trial could be abused if counsel treat it as a "dress-rehearsal" for trial, without *bona fide* attempts at settlement on its basis. If a mini-trial is unsuccessful in prompting a settlement, it adds further expense and delay to the resolution of the dispute.

(4) Voluntary, Binding Court-Connected Arbitration

(a) As a reference by the court to a private hearing (California "rent-a-judge")

(i) Definition

The California "rent-a-judge" method involves a reference procedure by which the court can appoint a referee, on agreement of the parties, to try all or part of a case. The referee is selected and paid for by the parties, and the result is made a judgment of the court, and appealable as such. A reference can be obtained at any time in the dispute, even

before any complaint is filed. The referee need not have any particular qualifications; often retired judges are used, or in complex cases, experts in the field of the case. The referee must submit a written report to the appointing court stating conclusions of fact and law; but if the parties agree, only brief conclusions need be stated. The procedure used can vary on agreement of the parties, from formal court-like proceedings to a more informal process. Witnesses are sworn, but the evidence need not be reported or even recorded.

This reference procedure gives a mechanism that is essentially arbitration, the difference being that the award is automatically a judgment of the court, and appealable as such.

(ii) Variations

There are five basic types of reference procedure in the United States.[28] In the first type, the subject matter that may be tried by reference is limited (e.g. Florida). In the second type, the referee's finding of facts may be treated as merely advisory (e.g. Texas). In the third type, the reference procedure may be used for all issues of fact and law only in exceptional circumstances; the referee's findings of fact must be accepted unless clearly erroneous, but a judge may review his findings of law (e.g. Alabama). The fourth type is similar to the third, except that if both parties consent, exceptional circumstances are not necessary (e.g. Indiana). Finally, in the fifth type of reference, all issues of fact and law in all cases is permitted, and the referee's decision has the weight of a jury verdict or trial court judgment (e.g. California method described previously). Costs of the rent-a-judge process may be paid for by the parties (e.g. in California); by the loser (e.g. in Florida); or by the State (e.g. in Texas).

(iii) Perceived advantages

Allowing disputants to select their own referee allows use of experts, which is more efficient; and because the parties have a role in choosing the referee, he may have more credibility to the parties. The process is flexible, as the parties can make it as formal or as informal as suits them and the particular dispute, and as the formality decreases, and because there is no waiting for a trial date, the dispute will be resolved faster. The entire process will also likely be cheaper because of its speed, even if the parties must pay the referee's fees under the particular reference procedure used. As well, if the parties pay the costs of the referee themselves, it saves cost to the State. The process still allows

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[28] "The California Rent-a-Judge Experiment: Constitutional and Policy Considerations of Pay-as-you-go Courts" (1981) 94 Harvard Law Review 1592.

confidentiality, as just the findings are a matter of record. This may be of value if one or all of the parties want secrecy for personal, professional or business reasons. The result is appealable as a judgment of the court, instead of the narrower grounds for review available when private arbitration is used. Removing cases from the courts, especially complex business disputes, frees the courts for other matters, and so increases access to justice for everyone else.

(iv) Perceived disadvantages and limitations

If the parties must pay the referee, it may be unfair if only the wealthy can afford to use this procedure. In addition, "secret trials" may be against public interest, because the public cannot scrutinize the government in their conduct of the administration of justice, and private hearings slow the development of the common law through precedents. Abuses by referees could also develop. However, if more court supervision were put in place, the efficiency and secrecy gains of the reference procedure would be lost.

(b) As a procedure of record (the Zuber Recommendations)

The 1987 Report of the Ontario Courts Inquiry (the Zuber Report) suggested that a voluntary arbitration mechanism be built into the justice system, in which either party could suggest arbitration, and if the other agreed, arbitration would proceed in place of court proceedings. This was to be a procedure of record, in which the arbitrator's award would be filed with the court as a judgment of the court, and appealable as such. The principles of natural justice were to apply to the proceedings, though not the strict rules of evidence. The arbitrator's fees were to be paid by the disputants.

Zuber did not indicate whether this was to be a reference procedure similar to that in California. The main distinguishing feature from the California rent-a-judge procedure is that this is to be a procedure of record; the advantages (and the criticisms) of a private hearing would thus be lost. Otherwise, Zuber's recommendations appear very similar to the California method.

(5) Involuntary, Non-Binding Procedures

(a) Court-annexed arbitration

(i) Definition

Prevalent in the United States, court-annexed arbitration is a hybrid of public and private adjudication, that requires certain cases to go to non-binding arbitration. This involuntary arbitration is generally required for all cases in which a money claim for damages is below a specified amount, typically in the range of $10,000 to $15,000, or in any case if both parties agree. Court-annexed arbitration programs generally use volunteers as arbitrators, and involve a short, informal, private proceeding. The disputants cannot choose their arbitrator, as arbitrators are court-appointed and cases are assigned to them at random. The arbitrators collect only a small fee, if any, from the State. They are often lawyers or retired judges.

Court-ordered arbitration was developed in the United States to deal with medium-sized claims, in order to reduce court congestion and costs, both public and private, by keeping cases out of court. As it is a non-binding procedure, it is in essence a method to promote settlement. The parties can accept the arbitrator's award, or settle on an amount themselves, based on the increased knowledge they have gained of the case, and how it is likely to be disposed of. Either party can disagree with the arbitrator's decision and request a trial *de novo* in the traditional court system. There are usually cost disincentives in place to discourage appealing arbitrator's awards that apply if the appellant's position is not improved by the trial.

(ii) Variations

Court-ordered arbitration may be limited to certain types of cases, or exclude some types from its ambit (e.g. civil rights cases). Some court-ordered arbitration programs emphasize acceptance of the arbitrator's award (by emphasizing the adjudicative aspects of the arbitration process and imposing heavier sanctions on appeal), and some emphasize the private settlement aspects (and thus tend more toward mediation than arbitration).[29]

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[29] Goldberg *et al.*, *supra*, note 14 at 226-27.

(iii) Perceived advantages

The primary advantages of court-annexed arbitration are its speed and cost-savings. The informal arbitration hearings are generally very brief, and there is little wait for them. Consequently, private legal costs are greatly reduced, and so are public costs; both because of speed, and because arbitrators are cheaper than judges. The cost-savings allow potential litigants who might otherwise be barred from the courts by the prohibitive costs of litigation to have a forum. The procedure is generally viewed as fair by all sides, as long as they have received a hearing by a neutral third party.[30]

(iv) Perceived disadvantages and limitations

The Constitutional limitation of section 96 which prevents the province from conferring on an inferior tribunal jurisdiction with respect to matters that fall within the jurisdiction of the superior courts, limits the use of compulsory arbitration. Compulsory arbitration itself may deprive particular classes of litigant of their "day in court". This results in a second-class justice for low-income and disadvantaged groups. Court-annexed arbitration may also be against the public interest as precedents are lost. Loss of precedents reduces the certainty in the law, and so may decrease the proportion of disputes that are privately settled. Arbitration may also undermine the process of affirming social norms through the courts. If a faster, less expensive method of dispute resolution like court-annexed arbitration were available, it may increase the number of claims being brought, therefore reducing or eliminating any gains in efficiency. The unrepresented may be at a disadvantage at arbitration hearings and arbitration is unsuited to cases involving complex issues of law. Costs and delays will increase if arbitration awards are appealed, so the procedure is inefficient if the proportion appealed is similar to the proportion that would have gone to trial in any event. There is little empirical evidence to show that court-annexed arbitration meets this guideline.[31] There are also concerns regarding the ability and qualifications of arbitrators, and whether they should be subject to professional standards. Using the amount of the claim for damages as the criterion by which a case is streamed into arbitration or the regular court system, essentially gives the plaintiff an election, because the plaintiff can set the amount of his damage claim to his preferred forum. Thus, a more powerful plaintiff could deprive a defendant of the speed and efficiency of arbitration to force a disadvantageous settlement when the defendant lacks the

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30 *Ibid.* at 231; Adler, Hensler and Nelson, *Simple Justice: How Litigants fare in the Pittsburgh Court Arbitration Program* (1983) Santa Monica, Institute of Civil Justice, Rand Corporation.

31 Goldberg *et al.*, *supra*, note 14 at 230.

resources to go to court. But if some other method of valuing a claim by the court were used, this would add cost and delay to the procedure.

(b) The summary jury trial

(i) Definition

The summary jury trial is an involuntary, non-binding procedure in which a mock jury is impanelled by the court, and each side presents a brief summary of proofs and arguments. The procedural rules are fixed, but less formal than in litigation. The summary jury reaches an advisory verdict, at which time the lawyers can question the jury about their deliberations. The purpose of this procedure is to promote settlement, by giving lawyers information regarding likely jury reactions.

(ii) Variations

Cost sanctions could be imposed on a party who proceeded to trial in rejection of the advisory verdict, if the party fails to improve his position.

(iii) Perceived advantages

Where parties to a dispute have reached an impasse, the summary verdict is a good basis upon which negotiation towards settlement can begin. Summary jury trials also force counsel to be prepared for the case in advance of the trial date, and thus promote earlier settlement.

(iv) Perceived disadvantages and limitations

Counsel must reveal their game-plan for trial. Thus, the summary jury trial should not be involuntary. In addition, the summary jury trial offers no opportunity for jurors to test the truth of counsel's summary of the witnesses' testimony. Presently, there are no controlled studies to prove that summary jury trials lead to increased rates of settlement; and if parties proceed to a trial after the summary trial, the latter has just added further delay and expense to the resolution of the dispute. Further, use of summary jury trials may discourage initiation of private negotiations and settlement, as parties wait to see what the summary jury trial may reveal.

(6) The Involuntary, Binding Procedure: Litigation

(a) Definition

Litigation in the traditional court system is an involuntary, binding adjudicative procedure, in which third party intervention in a dispute has reached its most extreme form, in a very formal, expensive and lengthy procedure. However, litigation may still be the most appropriate method of dispute resolution in some circumstances, and has some important advantages over other methods, that will highlighted below. The disadvantages of litigation have been dwelt on throughout this outline, and so will not be considered further here.

(b) Advantages

Litigation may be the most appropriate method of dispute resolution in cases involving public interest, so that such principles may be affirmed and developed through the common law. These may include constitutional questions, environmental disputes, and civil rights cases. This highlights an essential difference between litigation and other methods of dispute resolution; litigation is never concerned only with a particular dispute, but also the development of precedents for the future. This different emphasis may lead to quite different results than with methods that have no precedential value, and so are only concerned (or should only be concerned) with resolving the particular dispute between the particular parties. Cases involving complex issues of law may also be better suited to litigation than other methods. The formal rules of evidence which apply to litigation, while expensive in terms of time and money, are directed (hopefully) to finding the truth in the fairest way possible. Expedited proceedings are only feasible if parties and counsel trust each other to some extent - when trust is absent, litigation is probably the only fair way of resolving a dispute. Finally, litigation leads to the development of precedents, which are used as rules in negotiating private settlements. The threat of litigation alone can also promote settlement. Arguably, the biggest impact of litigation is on the majority of cases that are settled, rather than on the few that are litigated.[32]

(c) Methods for improving the efficiency of our court system

The following is a very brief survey of some ways that have been suggested of improving the efficiency of our court system.

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[32] *Ibid.* at 150.

(i) Pre-trial conferences

As mentioned previously, in addition to promoting settlement, pre-trial conferences can increase efficiency of trials by narrowing down the issues, obtaining admissions, limiting numbers of witnesses, increasing preparedness of counsel, and decreasing surprises at trial.[33] Increased use of, and emphasis on, pre-trial conferences could enhance this; as suggested earlier, this might be assisted by the ability to impose sanctions on counsel.[34]

(ii) Class actions

Increasing the availability of class actions might improve the efficiency of the court system. A cautionary note, however, is that of Justice Estey suggesting that Australia was the "promised land" in that class actions were completely unavailable there.[35]

(iii) Appeals

The concern with appeals is to balance the interests of the right to appeal and the high public costs of appeals. There is also the concern that because of the high private costs of appeals, the threat of appeal can be used by economically powerful parties to force disadvantageous settlements onto their opponents. Possible reforms at the federal level that would increase efficiency in appeals, and hence lower both public and private costs, have been suggested by Justice Estey.[36] They include: a national criminal court of appeal; addition of an interprovincial ad hoc appellate tribunal to hear cases referred to it by the Supreme Court of Canada; appeals by satellite; and use of pre-trial conferences in appeals.

On the provincial level, in Ontario, the Zuber Report suggested establishing in Ontario an intermediate court of appeal, and a separate final court of appeal, which requires leave to appeal.

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33 Watson, *supra*, note 25.

34 See p. 30.

35 Estey, "The Changing Role of Judiciary" (1985) 59:8 Law Institute Journal 1071 at 1076.

36 *Ibid.* at 1080-81.

(iv) Judicial management

Justice Estey[37] has also suggested improvements in the area of judicial management including the training of court staff within Canada instead of being sent to the United States and the establishment of a national justice centre, and provincial counterparts, for judicial and administrative education. The Canadian Judicial Centre, established to provide national coordination of education programs for judges, officially opened at the University of Ottawa in December 1988.[38]

(v) Cases involving complex, technical facts: use of experts

Cases involving complex, technical factual issues might require a different approach. It is already possible under Alberta Rule 235 for a trial judge to obtain the assistance of an expert to better enable him to determine the matters in issue. The expert in such a case can be appointed either by a party making an application by Notice of Motion to the trial judge, or on the judge's own initiative. Such a court-appointed expert is restricted to assisting the trial judge to determine the facts in issue and cannot make the final findings of fact. A further step has been made in the United States under Rule 706 of the Federal Rules of Evidence. Rule 706 allows use of a court-appointed neutral expert fact-finder, at any phase of a proceeding, who investigates the factual issues referred to him, and then at trial renders his opinion which is persuasive but non-binding. Use of such experts tends to enhance settlement by the parties when they learn of the expert's opinion.[39] This is more extensive than the Alberta Rules for reference to an inquiry (Rule 418 and 424 to 426), which are commonly used to determine the amount of a claim for damages, and cannot be used to refer the suit in its entirety.[40]

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37 *Ibid.* at 1082.

38 CBA Report (referred to above at p. 5) at 48.

39 Goldberg *et al.*, *supra*, note 14 at 296.

40 Stevenson and Côté, *Alberta Annotated Rules of Court*, 1981, at 394. See also, Alberta Law Reform Institute Research Paper No. 18 on *Referees*.

G. The Multidoor Courthouse: Intake Screening and Diversion[41]

(1) Definition

The multidoor courthouse, also known as a multifaceted dispute resolution centre, recognizes that particular disputes and disputants may be best suited to particular dispute resolution methods. As options proliferate, choosing the correct option becomes a problem in itself. The multidoor courthouse, in which disputes will be analyzed and diverted to the appropriate dispute resolution method, has been suggested as an answer to this problem.[42] In this approach, a disputant would be channelled by intake screening to the correct "door" in the courthouse. The courthouse would make all dispute resolution services available under one roof, including the initial step of intake screening described. The aims of the multidoor courthouse would be to inform the parties of the available alternatives, and to assist them in choosing the appropriate mechanism for their particular dispute.

(2) Variations

Compliance with the intake official's referrals could be voluntary or compulsory.

(3) Perceived Advantages

The multidoor courthouse should result in efficiency savings in terms of time and money, as disputes are diverted quickly to the correct method of resolution, rather than going to an inappropriate and, consequently, ineffective, initial method. Disputants should also be less frustrated with the legal system as the multidoor courthouse would provide them with information about all methods quickly. Access to, and legitimization of, new methods of dispute resolution would likely increase through use of the multidoor courthouse. In addition, a better understanding of the peculiar advantages and disadvantages of specific types of dispute resolution methods should result.

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41 Goldberg *et al.*, *supra*, note 14 at 514-16.

42 Sander, "Varieties of Dispute Processing" (1979) 70 F.R.D. 111; Cappelletti and Garth, *supra*, note 4 at 515; P. Pitsula, *Report on Alternate Dispute Resolution Projects*, 1987. The American Bar Association has recently developed three experimental multi-door centres in the United States.

(4) Perceived Disadvantages and Limitations

The success of a multidoor courthouse would depend largely on the skills of the intake official. Thus, there are concerns regarding the training required for, and the standards to be applied to, intake officials. There is also a concern that the multidoor courthouse would lead to a new bureaucracy that will send disputants from one method to another without any genuine attempts to address their particular problems. If the intake official's referrals are voluntary it is questionable whether any efficiency gains would be realized but if they are involuntary, policy concerns regarding fairness, access to justice and civil rights arise. Finally, as access to justice is increased, so is the potential that the multidoor courthouse will be flooded with time-consuming disputes of little merit or value.

CHAPTER 4 - ADR PROJECTS AND RESOURCES

This chapter contains descriptions of specific ADR projects and resources in Alberta, elsewhere in Canada, and in the United States.

A. In Alberta

In the following inventory, an attempt has been made to identify and briefly describe all significant alternative dispute resolution projects and resources currently in place in Alberta.

(1) Alberta Arbitration and Mediation Society (AAMS)[43]

Established in 1982, the AAMS is a non-profit organization funded primarily by the Alberta Law Foundation. The stated objectives of the AAMS are fivefold:[44] to promote, inform, publicize, communicate and improve the knowledge, application and techniques of arbitration and mediation procedures in the settlement of disputes; to inform and educate the business, professional, government and municipal community and the general public in the process and scope of arbitration and mediation procedures, and to gather and disseminate information for that purpose; to institute, support and carry out any research, program or activity with a view to promoting and improving an understanding of arbitration and mediation; to provide assistance to persons wishing to use arbitration or mediation procedures, including the establishment of one or more rosters of persons who are suited to act as arbitrators or mediators; and to establish facilities and implement procedures for the conduct of arbitration and mediation proceedings.

The AAMS has an excellent resource centre, containing materials on arbitration and mediation. They maintain lists of arbitrators and mediators which currently includes in excess of 150 experts from most fields, and will also provide facilities for hearings. The AAMS runs courses and seminars in arbitration through its office in Edmonton, and also through the University of Calgary, Faculty of Continuing Education. Those who complete these courses are included on the AAMS list as associate arbitrators; upon further education or experience, and an appearance before the AAMS Board of Accreditation, they can become accredited by the AAMS. The AAMS also sponsors the Community Mediation Program in Edmonton, discussed below. There are pamphlets published by the AAMS,

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43 AAMS: 408 Macleod Building, 10136 - 100 Street, Edmonton, T5J 0P1.

44 *Public Legal Education Programs Supported by the Alberta Law Foundation*, Edmonton, University of Alberta, 1984.

including "Arbitration, Mediation and You", which explain and promote arbitration and mediation as methods of dispute resolution.

(2) Community Mediation Program, Edmonton[45]

Initiated in 1986, the Community Mediation Program in Edmonton is a non-profit organization sponsored by the AAMS and City of Edmonton Social Services. At no cost to disputants, this Program provides volunteer community mediators, trained to resolve conflict in their neighbourhoods. The Program accepts disputes within the community, family and schools, as well as consumer, landlord and tenant and tribal, racial or ethnic disputes.

Once all parties to a dispute have agreed to use the Program there are four stages involved in attempting to resolve the dispute.[46] At the first introductory meeting, the mediator outlines the rules for the hearings: that everyone must remain seated, that each person will have an opportunity to speak, that everything revealed in the mediation hearing must be kept confidential, and that interruptions, shouting or abusive language are not allowed. The second stage involves issue identification; at the end of this stage, an agreement is reached as to what issues can be dealt with at the next stage. In the third stage, the mediator attempts to get the parties to understand each other's position. Finally, the fourth stage involves reaching an agreement. A month after an agreement has been reached, the parties are contacted to see if the agreement has been complied with, and to obtain feedback on the procedure.

The Community Mediation Program has published a pamphlet entitled "Seeing Eye to Eye", which cites the benefits hoped for in community mediation. For the individual, these include that community mediation is a fair method that reduces the isolation and alienation that result from conflict, and that it builds understanding and respect for different lifestyles. For neighbourhoods, benefits suggested were an increase in community confidence from the power and responsibility to resolve their own problems, increased trust, safer neighbourhoods, and that important local issues and resources are identified.

The Community Mediation Program was initially set up to cover only the west end of Edmonton, but due to poor response, was extended to cover the entire city. In the pilot stage of the Program, which ran from October 1986 to January 1988, approximately fifteen

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45 Community Mediation Program: 408 Macleod Building, 10136 - 100 Street, Edmonton, T5J 0P1.

46 Silvester, "Community Mediation: When the hardest thing is going home to the guy next door", Resource News, October 1987, at 7.

cases used the Program. The program is presently in a transitional state. As a result of the pilot stage of the Program, it was decided to make it a permanent, autonomous city-wide program. It has received the support of the Edmonton Federation of Community Leagues, and has been endorsed by the Mayor of Edmonton. In the second stage of the Program, the role and number of volunteers will be expanded, and with the publicity planned, the number of disputes handled should increase.

(3) Calgary Community Mediation Service[47]

Established early in 1988, the Calgary Community Mediation Service offers a mediation service to the community of Calgary that is very similar to, and based upon, the Edmonton Community Mediation Program. This Calgary project is sponsored by Calgary Legal Guidance.

(4) Better Business Bureau (BBB)[48]

The BBB is a self-regulating, non-profit organization, established and supported by local business communities. There are currently 190 BBBs across North America, of which 19 are in Canada and 2 are in Alberta. The goals of the BBS are twofold:[49] first, to promote self-regulation by business, such that the business environment will be fair both to business and to the public, and to disclose those businesses and practices that are unfair; and second, to educate individuals to help them make wise purchasing decisions.

The BBS are also involved in dispute resolution. Upon receiving customer complaints, the BBB will act as a mediator between the customer and the merchant involved, in cases where they have tried and failed to settle the disagreement themselves. The BBB will attempt to mediate customer and merchant disputes whether or not the particular merchant is a member of the BBB. If mediation is not successful, a formal arbitration process is also available through the BBB. The BBB claims[50] to be the most

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47 Calgary Community Mediation Service: #100, 615 MacLeod Trial S.E., Calgary, T2G 4T8.

48 There are two Better Business Bureaus in Alberta: for Central and Northern Alberta, #514, 9707 - 110 Street, Edmonton, T5K 2L9; and for Southern Alberta, #404, 630 - 8th Avenue S.W., Calgary, T2P 1G6.

49 *Better Business Bureau Consumer Resource Book and Membership Roster 1987, for Central and Northern Alberta*, North Hill Publications, Calgary, at 2-3.

50 "Effective Customer Relations and Complaint Handling", 1982, Better Business Bureau of Canada.

recognized and used third party complaint handling mechanism in North America. With their procedures, the BBBs have provided an alternative to the courts for consumers. It should, however, be noted that BBBs are essentially run by the merchants, and were established by them for selfish reasons. First, there was the concern of business that a few unscrupulous advertisers could given them all a bad name and thereby cost them money. There was also the concern that if business did not police itself, government would step in and business would lose control over the process.

(5) Landlord and Tenant Advisory Boards[51]

Section 49 of the Alberta *Landlord and Tenant Act* allows Landlord and Tenant Advisory Boards to be established. The functions of Boards are specified in section 49(2):

> 49(2) The functions of a Landlord and Tenant Advisory Board are as follows:
>
> (a) to advise landlords and tenants in tenancy matters;
>
> (b) to receive complaints and seek to mediate disputes between landlords and tenants;
>
> (c) to disseminate information for the purpose of educating and advising landlords and tenants concerning rental practices, rights and remedies;
>
> (d) to receive and investigate complaints of conduct in contravention of legislation governing tenancies.

Boards have been established in Banff, Calgary, Canmore, Edmonton, Fort McMurray, Jasper, Lethbridge, Medicine Hat and Red Deer.

Landlord and Tenant Advisory Boards aid in the area of landlord and tenant disputes in three ways. First, they prevent disputes from arising, by providing information on landlord and tenant rights and obligations. Second, the provision of the same information provides a basis on which landlords and tenants can resolve their disputes between themselves. Third, the Boards will mediate disputes between landlords and tenants to help them reach a solution. To these ends, the Boards publish pamphlets containing information on rights and obligations in the landlord and tenant relationship under the *Landlord and*

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51 Edmonton Landlord and Tenant Advisory Board: 10237 - 98 Street, Edmonton, T5J 0M7.

Tenant Act, answer specific inquiries in relation to the same, and provide mediators and facilities for mediation hearings.

(6) Workers' Compensation[52]

The *Workers' Compensation Act* of Alberta provides a statutory scheme for compensation of workers for earnings lost when they are disabled in the course of their employment. This applies to workers who suffer a temporary or permanent disablement due to accidents or diseases arising out of, and occurring in the course of, their employment. The Act applies to all workers and employers in Alberta, with the exception of those specified as exempt in the General Regulations of the Act. The Act is administered by the Workers' Compensation Board, an independent board with three members, who are appointed by the Lieutenant Governor in Council. Employers who are subject to the Act must pay the costs of Workers' Compensation. They are assessed each year based on their total payroll, in accordance with an assessment rate that is based on the accident cost experience of the employer's particular industry.

The Workers' Compensation Board claims that through Workers' Compensation, a "system of prompt adjudication of workers' claims for compensation replace the delays, uncertainties and expenses of legal action through the court".[53] However laudable these objectives may be, the *Workers' Compensation Act* section 18 has been challenged as unconstitutional, because it specifies that whether or not an eligible disabled worker wishes to accept the limited benefits available through Workers' Compensation, they and their family are barred from taking legal action against any employer or worker who is within the scope of the Act. The argument that this is discriminatory and infringes the worker's right to equality under the law, and so contravenes sections 7 and 15 of the Charter of Rights and Freedoms, was recently accepted by the Court of Queen's Bench in *Budge* v. *W.C.B.*[54] However, the relief granted was only a declaration that the particular legal action involved was not barred: section 18 was not struck down, although it was suggested that it should be amended. To date no amendments have occurred. The Workers' Compensation Board takes the position that section 18 is a reasonable limit of the right to equality under the law, within section 1 of the Charter, because the Workers' Compensation system could not work

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52 Workers' Compensation Board in Edmonton: 9912 - 107 Street, P.O. Box 2415, Edmonton, T5J 2S5. There are also offices in Red Deer, Grande Prairie, Calgary, Lethbridge and Medicine Hat.

53 Workers' Compensation Board, "Your Questions about Compensation Benefits Answered".

54 *Budge* v. *W.C.B.* (1987) 54 Alta. L.R. (2d) 97.

if employers did not have protection from suits by employees in exchange for paying the costs of Workers' Compensation.

(7) Individual's Rights Protection Act of Alberta (IRPA)

The IRPA provides a statutory scheme under which a statutory body, the Human Rights Commission, may act as both investigator and mediator in disputes involving discrimination prohibited by the IRPA. Section 20(1) of the IRPA provides that the Human Rights Commission shall investigate and endeavour to effect settlement of complaints. By section 20(5), the Commission can make recommendations to allow the complainant and the person who is alleged to have contravened the IRPA to settle the matter of the complaint. It is only if the Commission is unable to effect a settlement of the complaint that the Minister may direct a formal inquiry to be held, pursuant to section 27. The Alberta Court of Appeal has indicated that the Commission must make reasonable attempts to effect a settlement before a board of inquiry can be appointed to hold a formal inquiry into the complaint.[55]

(8) Alberta Family Mediation Society[56]

The Alberta Family Mediation Society develops and promotes family mediation across Alberta. Their areas of interest include mediation of post-divorce parenting arrangements, child custody and access, child support, and spousal maintenance and property disputes. The Society maintains a list of qualified family mediators, and puts out a newsletter pertaining to family mediation. The Society is also considering the standardization of necessary credentials for mediation.

(9) Family Conciliation Services, Edmonton Courts (FCS)[57]

In 1969, the Federal Ministry of Health and Welfare Canada established the Divorce Counselling and Family Affairs Unit, with the purpose of promoting and funding court-based conciliation services across the country. FCS of the Edmonton Courts, established in 1972, was the first conciliation court demonstration project in Canada. In its project stage from 1972 to 1975, FCS was funded by a federal grant. As a result of this successful project, it

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55 *Alberta Human Rights Commission* v. *Pro Western Plastics Ltd.* (1983) 4 C.H R.R., D/1579 (Alta. C.A.).

56 Alberta Family Mediation Society: Box 405, 918 - 16th Avenue N.W., Calgary, T2M 0K3.

57 Family Conciliation Services: #503, 10130 - 103 Street, Edmonton, T5J 3N9.

was concluded that there was a need for a family conciliation service within the court system, so the FCS was continued, supported by the Province of Alberta.

FCS accepts referrals from lawyers and judges of couples considering separation or divorce. Two stages of counselling are offered. The first stage, crisis intervention counselling, explores the possibility of reconciliation. The second stage arises only if the marriage cannot be saved; it involves mediation of issues that arise from the contemplated divorce or separation. As time passed, FCS found that the second stage was in greater demand; reconciliation counselling is no longer the primary focus in the majority of cases that FCS handles.

FCS began a pilot Custody Mediation Project on January 1, 1985. It was initially to run for two years; it has been extended until further notice. The Project applies when custody or access are at issue, in actions that have been commenced or continued in the Court of Queen's Bench or Surrogate Court in the Judicial District of Edmonton. Both parties to the proceedings must reside within the Judicial District of Edmonton. The stated objectives of the Custody Mediation Project are: to determine whether closed mediation can achieve a reasonable rate of settlements relatively promptly with the healthy concurrence of the two parties; and where an open assessment is necessary, to provide expert opinion to the court on the issues of custody and access.[58]

Thus, the project consists of two steps. The first step is closed mediation. A mediator from FCS assists the parties, at no cost, to negotiate an agreement. This is done on the understanding that all communications are confidential and made on a without prejudice basis. Both parties must agree to participate, and to comply with the mediation rules of FCS. The parties sign an agreement to this effect. If closed mediation does not resolve the dispute, then the mediator recommends the second step, Open Assessment. In Open Assessment, communications are not confidential, and are used by the assessor to prepare a Custody Assessment Report. This Report is admissible as evidence at the trial of the action in question. The assessor may also be called as a witness in court. Both parties must agree to participate in this stage. The assessor is selected from a list by the parties with the assistance of the mediator; the assessor's fees are paid by the parties, unless they qualify for a financial subsidy as a recipient of Alberta Legal Aid. The assessment involves the assessor interviewing both parties, the children involved, and any other persons considered appropriate by the assessor. The assessor evaluates all relevant social, educational, medical, psychological and psychiatric information the assessor considers

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58 Family Conciliation Services, "Further Amended Description of the Edmonton Custody Mediation Project".

necessary, to make a recommendation regarding custody or access that is in the best interests of the child involved. If the parties will not accept the assessor's recommendations, they may go to court.

For hardship cases, parties may apply to the Court on hardship grounds for the appointment of an Amicus Curiae from the Attorney General's Department. This hardship exception is only available if the parties live more than 220 kilometres from Edmonton, and can demonstrate they cannot go to FCS because of serious family or business related problems. Also, at least one of the parties must be a recipient of Alberta Legal Aid, and they must have the consent of the Department Amicus Curiae.

(10) Lethbridge Family Services[59]

Lethbridge Family Services offers a variety of programs, one of which is a mediation service. Their mediation program offers mediation services primarily for family disputes, but will also deal with community or school disputes if asked to do so. A fee is charged for use of this service.

(11) Victim-Young Offender Reconciliation Programs (VYORP)

Section 4 of the *Young Offenders Act* allows provincial programs to deal with young offenders, aged 12 to 17, outside of the court system. In Alberta, alternative measures to court may be used when the young person has no criminal record and accepts responsibility for the offence, if the offence involved is not very serious. Alternative measures used include community work, community supervision, and victim-offender reconciliation. These programs allow young people who have made one relatively minor mistake to avoid a criminal record. The John Howard Society[60] is involved in operation of the VYORP portion of the alternative measures program.

Cases are referred to the VYORP by the Youth Court Crown Prosecutor, based upon the police report and recommendations by investigating officers. The young person is then interviewed by a social worker to assess whether he is interested in the program. If the young person and victim agree to participate in the program, there is a reconciliation meeting. In this meeting, the parties discuss what happened and try to work out an agreement as to how the young person may pay back the victim. A community volunteer mediates this meeting. Common agreements include a written or spoken apology, personal

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[59] Lethbridge Family Services: 515 - 7th Street S.W., Lethbridge, T1J 2G8.

[60] John Howard Society: Rm. 200, 1010 - 1st Street S.W., Calgary, T2R 1K4.

service to the victim, compensation if any monetary loss was involved, or community service work. All conditions of the victim and young person agreement must be completed within three months of the young person entering the program.

The benefits of VYOPR that are claimed include the following. For the victim, VYORP allows them to have input into how the young person should pay for his transgressions. For the young person, VYORP allows them to accept responsibility and account for their actions, and to avoid a criminal record. For the community, public awareness is raised about the importance of community ownership in the prevention of crime, the Youth Court is left free to attend to more serious offences, and there is also the benefit of any community work that is performed by young persons.

(12) Saddle Lake Tribal Justice Research Centre[61]

Supported by the Alberta Law Foundation, the objective of the Saddle Lake Tribal Justice Research Centre is to develop a model Indian judiciary system for the Saddle Lake Tribe, which may also be of use to other tribes in Alberta and Canada. Features to be included in this system are the following:[62] community relations information and educational programs on the Indian Justice Model; rules and procedures for the justice system; development of a code of professional ethics for the personnel of the Indian Justice System; development of a pilot project to implement the model; and development of a consultation process with the provincial government and the federal government on the model and its implementation. Implementation of these goals has been delayed, due to lack of funding. The Court of Appeal of the Northwest Territories has recently indicated in *obiter dicta* that the courts will give some credibility to traditional ways of dealing with crime.[63]

B. Elsewhere in Canada

This section contains examples of specific projects of note that have been undertaken in Canada outside of Alberta, as well as some resources that are available. This is not an exhaustive list.

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61 Saddle Lake Tribal Justice Research Centre: Box 100, Saddle Lake, Alberta, T0A 3T0.

62 *Public Legal Education Programs ...*, *supra*, note 44.

63 *R.* v. *J.N.* (1986) 3 C.N.L.R. 119 (N.W.T. C.A.).

(1) Directory of Canadian Dispute Resolution Program[64]

The Network for Community Justice and Conflict Resolution in Kitchener published the *Directory of Canadian Dispute Resolution Programs* in 1986. It contains information on conflict intervention services within local communities and those provided on a province-wide basis, as well as organizations that provide support and resources for these services. The information was compiled from responses to a survey sent out by the Network. For each service or organization listed, the following information is supplied: name of service or organization, address, contact person, sponsors, organizational status, a brief description, the geographic area served, the types of dispute handled, the dispute resolution processes used, referral sources, funding sources, annual budget, annual caseload, start-up date, number of staff, role and number of volunteers, fees (if any), involvement in outreach or public education, innovations and future plans of the organization, the materials and resources available to them, and additional comments. Family mediation services are not included in this Directory.

(2) National Inventory of Divorce Mediation and Reconciliation Services[65]

The Department of Justice publication, *An Inventory of Divorce Mediation and Reconciliation Services in Canada*, was designed to allow family lawyers to advise their clients of available mediation services, in accordance with section 9(2) of the new federal *Divorce Act*. It lists mediation and reconciliation services available in each province, and also analyzes some selected characteristics of each.[66] From their data, of all the services across Canada, 53.2% are private practice, 2.5% are through family court, 1.0% are other court-based services, 11.8% are government services, 17.2% are law offices, 8.5% are non-profit community agencies, 4.9% are other services, and 0.9% did not answer the question. With a total of 40 services, Alberta has 5.9% of all available across the country, of which 45% are private practice, 2.5% are court-based services, 2.5% are government services, 25% are law offices, 20% are non-profit community organizations, 2.5% are other services, and 2.5% did not answer the question. Data was collected for this inventory up to March of 1987.

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64 *Directory of Canadian Dispute Resolution Programs*, Ontario: Network for Community Justice and Conflict Resolution, 1986.

65 *An Inventory of Divorce Mediation and Reconciliation Services in Canada*, Ottawa: Department of Justice, 1987.

66 *Ibid.* at 4.

(3) Toronto Rent-a-Judge Firm: "Private Court"[67]

A group of 26 Toronto civil lawyers, including J.J. Robinette and John Sopinka, have founded "Private Court" to resolve business disputes outside of the court system. Private Court is a rent-a-judge firm, that provides a judge for $2,000 per day to arbitrate disputes and make binding decisions under the Ontario *Arbitration Act*. Additional charges are imposed for administrative costs and for supplying facilities. Private Court opened in June of 1988. The founders of "Private Court" claim that this is a response to the backlog of cases in the courts that will save valuable time to businesses involved in disputes, as cases will be resolved within a few months at a third of the cost of a three to four year lawsuit. Disputants can pick their "judge" and agree on procedures to be used. Decisions can be appealed to an appeal body within the private court or to the Divisional Court of the Supreme Court of Ontario, in accordance with the *Arbitration Act*. Attorney-General Ian Scott has commented that the service will save taxpayers' money. He has noted that complex business litigation can tie up the courts for long periods of time that would be better devoted to cases with a public sector component. Private Court is the first rent-a-judge service for business disputes in Canada.

(4) Windsor-Essex Mediation Centre (WEMC)

The WEMC was a pilot project designed to explore alternatives to the adversarial system of dispute resolution. The WEMC opened in November of 1981; despite a strong evaluation of its performance, it did not receive funding past a three year pilot stage, and has ceased operations. The project was conceived of, and implemented by, the Canadian Bar Association. It was funded by grants from the Donner Canadian Foundation. An evaluation of the project was done in 1984.[68]

The goals of the WEMC were to provide mediation services, and to offer training and consultation services to other mediation centres. The mandate of the WEMC was to address perceived problems of costs and delays associated with the justice system, without adversely affecting an individual's access to that system. The areas dealt with included landlord and tenant disputes, consumer problems, neighbourhood disputes, debt recovery, domestic problems and other family disputes, employee and employer disputes, and pre-trial

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67 K. Makin, "Toronto Rent-a-Judge firm founded by Group of Leading Civil Lawyers", *Globe and Mail*, May 19, 1988.

68 The Windsor-Essex Mediation Centre, *History and Pilot Project Evaluation 1984*, Canadian Bar Foundation.

small claims hearings. Family disputes were tackled only if both spouses had received independent legal advice and were referred by counsel.

Volunteers were used as mediators. They included lawyers, social workers, psychologists, teachers and business people. A 21-hour training course and observation of three mediation sessions was required of each volunteer before they could act as mediators. Potential volunteers were screened; they had to have a professional background, good interpersonal skills, and a strong community profile and commitment. The first batch of mediators were trained by the Atlanta Neighbourhood Justice Training Centre; later volunteers were trained at the WEMC. Mediators were selected to mediate particular disputes because they had personal attributes and/or particular expertise which complemented the issues of the particular dispute and the nature of the disputants.

Use of WEMC to resolve disputes was voluntary. Generally, one party would contact the centre and a file would be opened. The other party would then be contacted and invited to participate in mediation; if they agreed, a mediation session would be arranged, usually within a week to ten days of the initial contact. Sessions were informal and non-adversarial. If agreement was reached, the mediator would draft a contract in plain language, and then review it with the disputants. If they agreed to all of its conditions, it would be signed. Of all matters that came to the WEMC, approximately 2/3 went to mediation; of the rest, either the other party could not be reached or refused to participate. Of those mediated, about 80% were settled. A follow-up a year later indicated that 75% of agreements were complied with. In the event of non-compliance, the injured party could sue on the contract, but parties were encouraged to return to the WEMC for further mediation. More than 90% of clients surveyed indicated that they were satisfied with the mediation service; 80% indicated that without WEMC they would have gone to court.

The WEMC staff and volunteers were also appointed as Referees of the Small Claims Court of Essex County in October of 1983; as a result, 1700 of the total 3000 cases WEMC handled were pre-trial hearings in small claims matters. Of the 1700, 750 were resolved. The role of WEMC mediators acting as small claims court referees included advising the court, conducting pre-trial settlement hearings, recommending payments, and reviewing and determining amounts of claims. Independent consultants, A.R.A. Associates of Toronto, found that this saved at least five court days. In addition, the number of actions filed in Essex Small Claims declined by 26%, perhaps indicating that actions that would normally have been filed in Small Claims were being diverted by the presence of the WEMC.

A large measure of the success of the WEMC was attributed to their commitment to publicity and promotion. They obtained local and national news coverage, provided speakers for many community groups, participated in radio, television and newspaper interviews, published and distributed more than 2000 brochures in the community, and paid for radio, television, and billboard advertisements.

(5) Family Mediation Canada (FMC)

Family Mediation Canada, established in 1984, is a national organization with the goals of educating the public about family mediation, establishing standards of practice and codes of ethics for mediators, and developing training programs. Supported by a grant from the federal Ministry of Justice, FMC has a membership of more than 500. It produces a quarterly magazine entitled "Resolve", and has assisted in founding provincial family mediation associations in Nova Scotia, Newfoundland, Alberta, and British Columbia. FMC has defined family mediation as containing six necessary elements.[69] Family mediation is a process in which a qualified and impartial third party (the mediator), helps the family resolve their disputes by agreement, the agreement is to be reached voluntarily, is based on sufficient information, and includes independent legal advice for each participant.

(6) Montreal Family Mediation Service (MFMS)[70]

MFMS, established in 1981 as a pilot project in the judicial district of Montreal, became a permanent program in 1984. It is a free public service with full government funding. MFMS is relatively unique, in that a global service is offered: mediators help couples negotiate not only custody and access, but also support and property division. MFMS developed a global service because they felt that issues of custody and access cannot be dealt with in isolation from financial matters, as they are intertwined. The Department of Justice recent study of four court-based divorce mediation services in Canada concluded that "... the degree of settlement of issues of child and spousal support is integral to satisfactory resolution of issues of custody and access and ought to be included".[71] Also, contrary to the common criticism of family mediation in general, and of services that offer global mediation in particular, it was found that "... women and children fare better,

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69 B. Landau *et al.*, *Family Mediation Handbook*, (Toronto: Butterworths, 1987).

70 L. Filion, "The Montreal Family Mediation Service: From the Competitive to the Complementary - The Changing Roles of the Legal and Mental Health Professions in a New Territory" (1986) 24, No. 2 Conciliation Courts Review 29.

71 C.J. Richardson, *Court-based Divorce Mediation in Four Canadian Cities: An Overview of Research Results*, Ottawa: Department of Justice, 1988, at 46.

economically and at all income levels, when there is a mediated settlement, a finding which is especially true for Montreal, the one mediation service studied which offers mediation of financial and property matters as well as custody and access".[72]

In addition to seven full-time mediators, and intake, management and clerical staff, MFMS also employs a staff attorney. The role of the staff attorney is to act as a legal consultant, giving mediators and their clients on both sides impartial legal information as to the law applicable to specific issues, the legal process, or the consequences of the options considered. The mediators are all trained through an intensive program in family therapy or marriage counselling, and have a working knowledge of basic accounting and general tax laws.

MFMS employs a structured mediation process, consisting of six stages. The first involves information, evaluation and orientation. The second stage is the definition of parental goals and options with all possible avenues regarding custody and access to the children considered. The third stage involves budgeting. The fourth is the identification of assets and liabilities. The fifth stage consists of negotiation, bargaining and decision-making. The sixth stage involves resolving the issues, and revising and writing the memorandum of agreement. The agreement is a declaration of intention only, and has no legal effect. It is sent to the lawyers of each party for discussion and ratification prior to final approval by the Court.

MFMS regards development of a code of professional conduct for mediators as essential for family mediation to be accepted by the legal community. To this end, they have promulgated eight suggested rules:[73] the mediator has an obligation to advise the couple to obtain legal consultation prior to starting the mediation process; the mediator shall advise the participants to seek independent legal counsel prior to resolving the financial and property issues; the mediator writes up the memorandum of agreement; this unsigned document is handed over to the parties and their lawyers; the staff attorney does not undertake any procedure for either party; all agreements prepared by the Mediation Service are reviewed by the staff attorney; the staff attorney will also advise the participants that the memorandum of agreement should be separately reviewed by independent counsel before it is signed; the parties must make full disclosure of all relevant information; and the parties must accept that their discussions will occur in a context of collaboration whereby each will respect the other and will work towards finding solutions which are satisfactory to both.

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72 *Ibid.* at 44.

73 Filion, *supra*, note 70 at 31-2.

(7) The B.C. Mini-Trial

The voluntary pre-trial procedure in British Columbia, the mini-trial, is described in Chapter 3, at page 31.

C. In the United States

In this section, some specific alternative dispute resolution projects and resources in the United States are described. This is not an exhaustive list.

(1) A.B.A. Standing Committee on Dispute Resolution[74]

In 1977, the American Bar Association established a Special Committee on Dispute Resolution, to coordinate A.B.A. activities in this area. The Committee was reconstituted into a Standing Committee in August 1986, giving it a more permanent status within the A.B.A. The Committee has six key areas of interest:[75] long-range strategic planning; coordination of information in a Resource Centre that provides information and technical assistance; state and local bar activation; judicial education and activation; professional education for legal and non-legal practitioners; and increasing law school curriculum in dispute settlement techniques. The Committee has been closely involved in the conception and implementation of the Multidoor Dispute Resolution Centres Project.

(2) A.B.A. Dispute Resolution Directory[76]

The American Bar Association Special Committee on Dispute Resolution, considered above, has published a directory of dispute resolution programs and services in North America. For each program or service in the *Directory*, the following information is given: title, address and Director of program or service, type of service offered, community served, start-up date, annual budget, funding sources, annual caseload, types of cases handed, case dispositions, referral sources, staff and training, program procedures, public relations, and any comments. The *Directory* focuses on dispute resolution centres which deal with interpersonal disputes. Of the more than 300 listings, 50% of the programs have been

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74 Pitsula, *supra*, note 42; *A.B.A. Dispute Resolution Directory*, see *infra*, note 75.

75 Pitsula, *ibid.* at 8-9.

76 American Bar Association Special Committee on Dispute Resolution, *Dispute Resolution Program Directory*, Washington: A.B.A., 1986. The information given on Canadian programs and services in the *Directory* is incomplete.

developed since 1980; 23% since 1983. Forty-six States in the U.S. have alternatives in dispute resolution available, twenty-five of which have dispute resolution legislation.

(3) American Arbitration Association (AAA)[77]

The AAA, established in 1926, is a public service, non-profit organization that offers a multitude of dispute resolution services. A leading advocate of alternatives in dispute resolution, the AAA administers arbitration, mediation, mini-trials, elections and other voluntary settlement procedures in more than 40,000 disputes each year. The AAA maintains dispute resolution panels with more than 60,000 impartial experts. The AAA has developed the AAA Commercial Arbitration Rules to govern the conduct of hearings.[78] These are often used in the commercial context in the United States, where it is common for arbitration clauses to stipulate that the AAA rules will be followed. The AAA, in conjunction with the American Bar Association, has also promulgated a code of ethics for commercial arbitrators.[79]

(4) Program on Negotiation at Harvard Law School (PON)

Established in 1983, PON at Harvard Law School is an applied research centre that is recognized internationally for its work on improving the theory and practice of negotiation and dispute resolution. PON has six major components:[80] the Dispute Resolution Programs promote research and experimentation on an array of alternative dispute resolution mechanisms, sponsor workshops and conferences, and prepare bibliographies; the Harvard Negotiation Project seeks to improve the world's ability to deal constructively with conflict, develop and encourage the use of improved theory and training in negotiation and mediation, and develop a small claims mediation program; the Negotiation Roundtable is a weekly working research group that concentrates on negotiation and dispute settlement theory, and direct practical applications of theoretical advances; the Nuclear Negotiation Project focuses on how an improved process of negotiation can help reduce the risk of nuclear war; the Public Disputes Program is based on the idea that mediated negotiations can enhance the fairness, efficiency and stability of public resource allocation decisions; and various publications are produced by those involved in the above five projects who

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77 Goldberg, *et al.*, *supra*, note 14 at 190-201; Pitsula, *supra*, note 42 at 17-8.

78 *Ibid.* at 191.

79 *Ibid.* at 196.

80 Pitsula Report, *supra*, note 42 at 16-7.

collaborate on curriculum development, research, and theory building, and design projects to bridge the gap between dispute resolution theorists and practitioners.

PON has also published the best-seller *Getting to Yes*,[81] which describes the methods of principled negotiation which they have developed.

(5) Multidoor Courthouse, District of Columbia[82]

Established in 1984, the D.C. Multidoor Courthouse Project is one of three created by the American Bar Association Special Committee on Dispute Resolution, the others being in Houston and Tulsa. The D.C. Project is connected to the D.C. Superior Court, a large, urban trial court with jurisdiction over all local legal matters. This Court made a dual commitment to the Project: to increase the range of options offered to citizens for resolution of disputes, and to acquaint them with the alternatives available, helping them select the one best suited to their needs. The essential element to the success of such a project is felt to be a "sophisticated screening and referral operation that is both visible and accessible to the public".[83] To this end, the two Intake Centers were located where people would go when they are involved in a dispute: the courthouse, and the D.C. Bar's Lawyer Referral and Information Service. There, intake specialists acquaint disputants with the options. There are more than forty dispute resolution programs in the D.C. community.

(6) Early Neutral Evaluation, San Francisco (ENE)[84]

ENE was designed to overcome barriers to communication and early, realistic case analysis, by providing an early, neutral assessment of disputes. In the ENE project in San Francisco, lawyers are used as evaluators, to confidentially assess both sides of the case. This evaluation is based on written statements and oral presentations to the evaluator. Studies of ENE have been favourable: the "goals were to force the parties to confront the merits of their own case and their opponent's at an early stage, to identify which matters of fact and law actually were in dispute, to develop an efficient approach to discovery, and to

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81 R. Fisher and W. Ury, *Getting to Yes*, Boston: Houghton Mifflin, 1981.

82 Finkelstein, "The D.C. Multi-Door Courthouse" (1986) 69 Jud. 305.

83 *Ibid.* at 307.

84 W.D. Brazil *et al.*, "Early Neutral Evaluation: an experimental effort to expediate dispute resolution" (1986) 69 Jud. 279; D.L. Levine, "Early Neutral Evaluation: a follow-up report" (1987) 70 Jud. 236.

provide a frank assessment of the case".[85] It was also recognized that ENE can be used to increase the likelihood of settlement.[86]

(7) Community Boards, San Francisco[87]

The Community Boards of San Francisco represent the establishment of another justice system at the neighbourhood level, based on the philosophy that justice work in a democratic society is the responsibility of all people within the society. Thus, the Community Boards emphasize the importance of community responsibility. The Executive Director of the Community Boards, Ray Shonholtz, described the process involved in this way:[88]

> "We currently train hundreds of volunteers as case developers, outreach workers, hearing panellists, follow-up workers and trainers. Outreach workers inform the community of the purpose and availability of the program, recruit members and build respect for the process within the community. Case developers assist each party in identifying issues, while encouraging them to express and resolve the problem at a panel hearing. In addition, this worker selects the panellists she or he feels would be appropriate to "hear" the dispute. Panellists serve as a conciliation team of 3 to 5 neighbourhood residents and provide a "safe place and structure" for the resolution of the conflict. The conflict resolution process begins with briefing of panellists by the case developer on the basic issues involved in the conflict. Once a conflict has completed the hearing process, follow-up workers contact the parties involved, ask them to evaluate the process, identify any unresolved issues that may need further work by the panel process, and provide information on other services needed within the community."

The Community Boards handle disputes within the neighbourhood, family and schools, and between landlord and tenant and consumer and merchant. The service is available to disputants at no charge; it is funded by corporations and private foundations. Over 90% of mediation hearings are successful in reaching an agreement.

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[85] Levine, *ibid.* at 240.

[86] *Ibid.* at 236.

[87] R. Shonholtz, "The San Francisco Community Board Concept", in A.B.A. Special Committee on Dispute Resolution, *Problem Solving Through Mediation*, 1984, at 57-69.

[88] *Ibid.* at 58.

(8) Rent-a-Judge, California

The Rent-a-Judge system available in California is described in Chapter 3, at pages 31-33.

(9) The Pittsburgh Court Arbitration Program[89]

The Pittsburgh Court Arbitration Program is a court-annexed arbitration system that has been in place since 1952. In this system, all cases in which the claim for damages is less than $20,000 are arbitrated by panels of three arbitrators. Arbitrators, who must be active members of the Bar to qualify, are assigned at random to cases, and hearings take place within the court. Arbitration is compulsory, but arbitral decisions can be appealed. Appellants must pay the costs of the arbitration if they do not improve their position. Most disputants who used arbitration felt that it was fair, as they had received a hearing by a panel of neutral third parties. Access to justice is increased, as arbitration is less expensive to litigants, and the fear of a flood of litigation has not materialized so far. Overall, the Pittsburgh Court Arbitration Program was found to be fair and efficient, with the caveats that unrepresented parties were found to be at a disadvantage, the cost of appealing was prohibitive to some, and arbitration is not appropriate for cases involving complex issues of law.

(10) Court Mediation Service, Maine[90]

In a project in small claims mediation, initiated in Maine in 1977, small claims litigants can go to mediation at the suggestion of the judge. The litigants then proceed with a mediator to another room in the courthouse and attempt mediation of their dispute. If an agreement is reached, the mediator writes it out, all parties sign it, and it is sent to the judge for final approval. If approved, it is an order of the court and is not appealable. If mediation is unsuccessful, disputants return to the courtroom for a trial that same day. This program has been expanded to include domestic disputes and landlord and tenant matters.

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89 J.W. Adler *et al.*, *Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program*, U.S.: The Rand Corporation, 1983.

90 W. DeJong *et al.*, *The Use of Mediation and Arbitration in Small Claims Disputes*, U.S. Department of Justice, 1983, at 76-86.

(11) Civil Appeals Management Plan (CAMP)[91]

First instituted in 1974, the aims of CAMP are to conserve judicial resources, by promoting resolution of appeals by settlement, expediting appeals through clarification of the issues, and disposing of minor procedural motions. CAMP has yielded substantial time and cost savings. It is used in several of the Circuits of the Federal Court, and in a few of the State appellate court systems. CAMP utilizes Staff Counsel, who conduct pre-argument conferences and administer the program. In CAMP, the appellant submits a Pre-Argument Statement, and the Staff Counsel then schedules a CAMP conference. The conference includes the Staff Counsel, attorneys for the parties, and may also include the parties themselves. Pre-argument conference guidelines stipulate that attorneys must be thoroughly prepared, and must obtain advance authority from clients to make such commitments as are reasonably anticipated. Also, the court can not be informed about discussions or actions at a conference. The conference may last several hours; when necessary, more than one conference may be held. However, parties have the right to proceed with the appeal from one conference. It was found that "CAMP reduces frivolous appeals while preserving the availability of appellate review. Staff Counsel often identifies weaknesses in the arguments of parties who bring meritless claims, and in such cases, the appellant not infrequently decides to withdraw the appeal".[92]

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91 Kaufman, "Must Every Appeal Run the Gamut? - The Civil Appeals Management Plan" (1986) 95 Yale L.J. 755.

92 *Ibid.* at 763.

APPENDIX

CBA Task Force Report, Part IV*

Report of the Canadian Bar Association Task Force on Alternative Dispute Resolution:

A Canadian Perspective

A Law for the Future Fund Project

August 1989
The Canadian Bar Association
Ottawa, Ontario

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PART IV

RECOMMENDATIONS

A. Introduction

When this Task Force was first constituted at the request of President Pat Peacock, Q.C., its primary responsibility was to provide advice to the President and his Executive on the current state of ADR developments in Canada. With the funding provided by the Law for the Future Fund came an additional responsibility - to focus on identifying problems and on making specific, practical and achievable recommendations for future action.

The starting point for the work of the Task Force, however, was a firm commitment by the Canadian Bar Association to the use of alternative dispute resolution in the Canadian justice system. In August, 1987, the Canadian Bar Association passed the following resolution:

> WHEREAS it is desirable for all citizens to have access to justice; and
>
> WHEREAS litigation in the Courts is widely regarded as being excessively complex, expensive and slow;
>
> BE IT RESOLVED THAT the Canadian Bar Association supports the study and development of alternative forms of Dispute Resolution.

In the fall of 1988, President Pat Peacock, Q.C., wrote in "the National":

> Alternate Dispute Resolution (ADR) is one of the developments in the practice of law in Canada that is rapidly gaining momentum.
>
> With growing concern about access to our traditional systems, certain groups are turning to alternative means of dispute settlement. Mediation, arbitration and private courts are now in the news as the public seeks alternatives to obtain fair, effectively, timely and affordable justice.
>
> I suggest that the development of ADR in this country requires the dedicated attention of the Canadian Bar Association. It is a concept that will influence the way we as lawyers practice in Canada.

The recommendations moved forward from this positive statement. They are based on information obtained about recent Canadian devel-

opments in the field, on submissions made by experienced professionals in Canada and on preliminary or final conclusions reached after a brief analysis of several different issues.

This Report must be considered a starting point only. In many instances, the complex issues identified by the Task Force were far too difficult to permit the necessary study and evaluation in the short nine months the Task Force had to complete its tasks. Accordingly, the Task Force has encouraged future research and study in many instances where the solution to a particular problem was not entirely clear. The Task Force has also recommended that a Special Standing Committee in ADR be established to ensure that the momentum generated by the Task Force's work continue, that its recommendations be implemented and that the effectiveness of its recommendations be measured at a specific point of time in the future.

There is one overriding recommendation. The Task Force recommends and encourages the Canadian Bar Association at national and provincial levels, the governments of Canada at all levels, Canadian Law Reform agencies and any appropriate funding organizations to respond openly and positively to requests for assistance, whenever possible, in the form of financial support, allocation of human resources, creative policy development and necessary legislative action to increase the likelihood of achieving the long term goals that the recommendations support.

B. Recommendations

1. That curriculum and course materials in ADR be developed for use within Canadian public schools and that Ministers of Education and Justice in Canadian jurisdictions be urged to support their development and implementation.
2. That curriculum and course materials in ADR with a strong interdisciplinary focus be developed for law students and that Canadian law schools be urged to support their effective implementation.
3. That curriculum and course materials in ADR be developed for continuing legal education and bar admission programs and that the organizations responsible for such programs be urged to support their effective implementation.
4. That the Canadian Judicial Centre be urged to provide suitable training in ADR techniques and skills to both experienced and newly appointed judges.
5. That community and ADR organizations, with the support of the Canadian Bar Association, be urged to present public education programs on the use of ADR processes.

6. That the Canadian Bar Association establish a Special Standing Committee on ADR to coordinate the implementation of the recommendations of the Task Force and any subsequent initiatives adopted by the CBA.
7. That the Canadian Bar Association propose a Liaison Committee between the Special Standing Committee in ADR of the Canadian Bar Association and the Standing Committee on ADR of the American Bar Association for the purpose of sharing information on ADR developments and to encourage the use of ADR in resolving business disputes between nationals of the two countries.
8. That the Canadian Bar Association establish a national directory of ADR services, education programs, legislation, organizations, training bodies, professional associations available or offering their services in Canada, that each provincial Branch be encouraged to keep a similar local directory and that the directory be published and made available on a data base in CBANET.
9. That the Canadian Bar Association encourage the establishment of provincial interdisciplinary advisory councils on dispute resolution to investigate and recommend cooperative actions to be taken in Canada to promote the orderly development, provision and utilization of dispute resolution processes specifically suited to Canadian society.
10. That the Canadian Bar Association propose a Special Judiciary-Bar Committee to study, evaluate and recommend ADR techniques specifically suited to cases in litigation and to recommend methods for uniform implementation of these techniques in the Canadian judicial system.
11. That the Canadian Bar Association adopt, as a principal theme for its 1990 Law Day Program, the subject of ADR.
12. That the Canadian Bar Association prepare and disseminate to members of the public information about the effective use of ADR.
13. That the Canadian Bar Association establish and advertise a Speaker's List in each Canadian jurisdiction with lawyers willing to speak on the subject of ADR.
14. That the Canadian Bar Association recognize credible and responsible ADR organizations and programs as a valuable aspect of the Canadian justice system and that appropriate institutions be urged to give the necessary support, on a long term basis, to enable these organizations and programs to develop, improve and maintain quality ADR services.
15. That the Canadian Bar Association urge further research and study into suitable and effective ADR processes for Canadian society and that appropriate institutions be urged to give the necessary support to ensure quality research and study.
16. That the Canadian Bar Association encourage and support associa-

tions of ADR professionals to enable them to develop proper training programs and continuing education programs to ensure a sufficient number of skilled and experienced individuals to act as neutrals in ADR processes in Canada.

17. That the Canadian Bar Association urge further research and study on the issue of accreditation of neutrals for ADR processes and that appropriate institutions be urged to give the necessary support to ensure quality research and study.
18. That the Canadian Bar Association urge further research and study on the effectiveness of mandatory ADR processes and on the suitability of such mandatory processes in the context of particular kinds of disputes.
19. That the Canadian Bar Association urger further research and study on legislative institutionalization of ADR to determine which kind of legislation works well, which does not and which is more effective than others.
20. That the Canadian Bar Association urge the Attorneys General of common law provinces to revise their arbitration legislation in order to provide a coherent, modern system of commercial arbitration and further encourage the Attorneys General to make every effort to ensure the uniformity of such legislation throughout the provinces.
21. That the Canadian Bar Association urge the Attorneys General across Canada to enact legislation providing for an enforcement mechanism of arbitral awards made in other provinces which will be equivalent to the provisions of the *New York Convention* and the UNCITRAL *Model Law* which have been adopted for foreign arbitral awards.
22. That the Canadian Bar Association urge the Attorneys General of Canada to identify, evaluate and recommend for adoption, where appropriate, international conventions and treaties to which Canada is not a party respecting the resolution of disputes and enforcement of awards and judgments.
23. That the Canadian Bar Association urge the Attorneys General to prepare inventories of all legislation and regulations incorporating ADR processes in their respective jurisdictions and make those inventories available to interested persons.
24. That the Canadian Bar Association urge the governments of Canada to study and evaluate their own commercial practices and adopt as a matter of policy the use of appropriate ADR processes to resolve disputes in appropriate circumstances.
25. That the Canadian Bar Association urge the governments of Canada to study and evaluate the appropriateness of their current practices and approaches to resolving significant public interest issues and to respond positively to non-adjudicative models of dispute resolution.

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